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The Subordinate Status of Negative Speech Rights

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The Subordinate Status of Negative Speech Rights

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INTRODUCTION

During the October 2009 Term, the Supreme Court confronted two issues that, on the surface, appeared to share little in context or character. In *Christian Legal Society v. Martinez (CLS)*,¹ a student group challenged a law school's withholding of official recognition from the group for its refusal to comply with the school's policy barring discrimination on the basis of sexual orientation.² *Milavetz, Gallop & Milavetz, P.A. v. United States*³ tested a requirement that attorneys who furnish bankruptcy-assistance services include in advertisements a statement to the effect that: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code."⁴ Linking the cases was the plaintiffs' contention that the government had interfered with their ability to convey their chosen message—not by forbidding expression of the message, but by foisting on them speech or association that would alter or dilute that message. The plaintiffs thus

1. 130 S. Ct. 2971 (2010).

2. The Christian Legal Society interpreted its by-laws to exclude individuals who engaged in "unrepentant homosexual conduct." *Id.* at 2980. *See infra* text accompanying notes 313-27 (discussing *CLS*).

3. 130 S. Ct. 1324 (2010).

4. *Id.* at 1330 (quoting 11 U.S.C. § 528(a)(4) (2006)). *See infra* text accompanying notes 162-67 (discussing *Milavetz*).

invoked the negative First Amendment right⁵ of freedom from government compulsion to engage in speech or association that impairs expressive activities.

These challenges also met a common outcome: the Court's dismissal of the claim as insubstantial or irrelevant.⁶ However plausible that result might be in these two instances, it is also symptomatic of a broader and unacknowledged vulnerability of negative First Amendment rights. While some Court pronouncements indicate that negative and affirmative speech rights occupy the same constitutional plane,⁷ the Court's disposition of asserted negative rights suggests otherwise. Since its generally recognized origin in *West Virginia State Board of Education v. Barnette*,⁸ the right to resist governmentally imposed expressive activities has evolved into a sprawling and ungainly doctrine. Invoked in efforts to thwart requirements ranging from acceptance of military recruiters at law school campuses⁹ to subsidies for generic advertising of agricultural products,¹⁰ the underlying idea has lost much of its coherence and explanatory power. Efforts to contain

5. An early use of the term "negative rights" in this context, as distinguished from affirmative rights to speak and associate, appears in David B. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C. L. REV. 995, 995-96 (1982).

6. Analytical devices for deeming negative rights inapplicable to the issue at hand are discussed *infra* Part III.B.

7. See, e.g., *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995) (Powell, J., plurality opinion) ("[S]ince all speech inherently involves choices of what to say and what to leave unsaid, . . . one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" (quoting *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 11, 16 (1986))); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988) (referring to "[t]he constitutional equivalence of compelled speech and compelled silence in the context of fully protected expression"); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34 (1943))).

8. 319 U.S. 624 (1943). See *infra* text accompanying notes 16-32 (discussing *Barnette*).

9. See *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47 (2006). See also *infra* text accompanying notes 68-80 (discussing *FAIR*).

10. See *infra* Part I.D.3 (discussing trilogy of advertising cases).

these diverse issues within a comprehensive principle have thus produced uncertain application of an increasingly abstract right. Moreover, regarding this welter of loosely related areas as governed by a single core concept risks diluting the principle's potency on occasions where it most aptly applies.¹¹ Indeed, the formally co-equal status of a right to refrain from speaking has obscured the weakness in practice of an unadorned¹² right to avoid unwanted communication.

This Article does not propose another general theory or test for assessing governmental mandates that might be viewed as implicating negative speech rights.¹³ On the contrary, the Article argues that the various clusters of holdings ostensibly traceable to *Barnette* should be recognized as discrete doctrinal branches to be understood on their own terms. The idea is hardly novel in First Amendment jurisprudence. As any treatise on constitutional law reflects, affirmative speech rights have long been organized into separate treatments of commercial speech, the public forum, symbolic conduct, and many other topics that are colored by transcendent themes but are still largely self-contained. Part I provides an overview of five distinct fields in which the Court has entertained claims of illegitimate government compulsion to engage in speech. Part II describes the confusion and inconsistency engendered by attempts to identify a single rationale that unites this farrago of cases. Part III analyzes how, in the absence of specific protective principles, negative speech rights have been susceptible to secondary status.

I. NEGATIVE SPEECH RIGHTS AND THEIR LIMITS: FIVE SETTINGS

Rights against compelled speech have been asserted, and sometimes upheld, in at least five principal contexts.

11. Cf. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) ("To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech.").

12. See *infra* Part III.A (discussing the notion of "hybrid" rights in this area).

13. For examples of such approaches, see *infra* notes 349-75 and accompanying text.

Given the presence of distinctive subcategories,¹⁴ even this number understates the breadth of issues encompassed within the notion of negative speech rights. Moreover, the concept is sufficiently elastic that the classification scheme presented here is by no means inevitable.¹⁵ However organized, though, the multiplicity of disputes in which negative speech claims are brought suggests the futility of seeking their resolution through a single, overarching philosophy.

A. *Compelled Participation in Voicing the Government's Message*

As noted earlier, the Court's opinion in *Barnette* is seen as enshrining the principle of First Amendment protection against compelled speech.¹⁶ At the same time, however, the particular ruling embodied by *Barnette*—invalidation of the claimant's obligation to personally declare a governmentally chosen viewpoint—has occurred infrequently in subsequent cases. Indeed, only the Court's decision in *Wooley v. Maynard*¹⁷ falls squarely within this template,¹⁸ and even the conception of that holding as a proper outgrowth of *Barnette* has met with considerable skepticism.¹⁹

Barnette represented the culmination of a dramatic episode in the annals of the Court and the life of the

14. See *infra* Part I.D (discussing different types of compelled subsidies).

15. For various approaches that differ from this Article's categorization, see, for example, Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147, 148-50 (2006); Leslie Gielow Jacobs, *Pledges, Parades, and Mandatory Payments*, 52 RUTGERS L. REV. 123, 131 (1999); Howard M. Wasserman, *Compelled Expression and the Public Forum Doctrine*, 77 TUL. L. REV. 163, 169 (2002).

16. See *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 61 (2006); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005); Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451, 451 (1995).

17. 430 U.S. 705 (1977).

18. See *Johanns*, 544 U.S. at 557, which characterizes *Barnette* and *Wooley* as "true 'compelled speech' cases, in which an individual is obliged personally to express a message he disagrees with, imposed by the government . . ." See also Alexander, *supra* note 15, at 148, which describes the "*Barnette*/*Wooley* line" of cases as comprising only those two cases.

19. See *infra* notes 43-44, 383 and accompanying text.

nation.²⁰ The State Board of Education had directed public schools to begin their daily program with a ceremony in which all students were required to salute the American flag and recite the Pledge of Allegiance.²¹ The plaintiffs, a family of Jehovah's Witnesses, sought an exemption on the ground that this conduct clashed with the tenets of their religion.²² In an extraordinary reversal of recent precedent,²³ the Court sustained the plaintiff students' First Amendment right to refrain from participating in the ceremony.²⁴

Justice Jackson's memorably aphoristic opinion for the Court pointedly declined to rest on the free exercise claim pressed by the plaintiffs.²⁵ Instead, Jackson viewed both parents and children as invoking a broader "right of self-determination in matters that touch individual opinion and personal attitude."²⁶ The Court's inquiry thus focused on whether the State violated that right when it forced students, whose attendance at school was required by law,

20. For a lucid account of the events leading to the Court's decision, see Vincent Blasi & Seana V. Shiffrin, *The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and the Freedom of Thought*, in CONSTITUTIONAL LAW STORIES 409, 409-24 (Michael C. Dorf ed., 2d ed. 2009).

21. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 626 & n.1 (1943).

22. The Jehovah's Witnesses based their objection on their interpretation of a passage of Exodus in which God proscribes "bow[ing] down" to a "graven image." *Barnette*, 319 U.S. at 629 (citation omitted).

23. The Court had ruled against a similar claim by Jehovah's Witnesses in *Minersville School District v. Gobitis*, 310 U.S. 586, 599-600 (1940). During the interim, three members of the majority in *Gobitis* signaled their retreat from that position, effectively inviting new legal challenges to mandatory flag salute ceremonies. See *Jones v. Opelika*, 316 U.S. 584, 623-24 (1942) (Black, Douglas, & Murphy, JJ., dissenting) ("[W]e think this is an appropriate occasion to state that we now believe that [*Gobitis*] also was wrongly decided. . . . The First Amendment does not put the right freely to exercise religion in a subordinate position.").

24. *Barnette*, 319 U.S. at 642.

25. *Id.* at 634 ("[T]he issue [does not] turn on one's possession of particular religious views or the sincerity with which they are held."). Nor did the Court deem the school authorities' presumably benign motives relevant to its analysis; "[s]truggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men." *Id.* at 640.

26. *Id.* at 631.

to “mak[e] a prescribed sign and profession” amounting to “a compulsion . . . to declare a belief.”²⁷ In the Court’s eyes, the state’s interest in promoting national unity²⁸ could not justify requiring such an “affirmation of a belief and an attitude of mind.”²⁹ Rather, enforced participation in this ritual would betray the constitutional commitment to “individual freedom of mind in preference to officially disciplined uniformity.”³⁰ That the plaintiffs’ objection may have contradicted the values and even inflamed the sensibilities of most citizens was reason to sustain, not override, that objection. As Justice Jackson declared in one of the Court’s most celebrated passages, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”³¹ Accordingly, the Court struck down the compelled flag salute and pledge as an unconstitutional invasion of “the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”³²

Over three decades later, the *Wooley* Court cited *Barnette*’s bar against such invasions as grounds for overturning the Maynards’ misdemeanor conviction for covering the state’s motto on their license plate.³³ New Hampshire justified mandatory display of the motto, “Live Free or Die,” on noncommercial vehicles as a means of facilitating identification of these vehicles and of “promot[ing] appreciation of history, individualism, and state pride.”³⁴ As Jehovah’s Witnesses, however, the couple found the motto “morally, ethically, religiously and

27. *Id.* at 630-31.

28. *See id.* at 631 n.12.

29. *Id.* at 633.

30. *Id.* at 637.

31. *Id.* at 642.

32. *Id.*

33. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (quoting *Barnette*, 319 U.S. at 642).

34. *Id.* at 716.

politically abhorrent.”³⁵ The Court acknowledged that the passive display of the motto on the Maynards’ license plate intruded on personal liberty less than a compelled flag salute, but still found *Barnette*’s central logic directly applicable.³⁶ That logic flowed from the proposition that the First Amendment’s protection of freedom of thought “includes both the right to speak freely and the right to refrain from speaking at all.”³⁷ The crucial feature thus presented in both cases was state conscription of an individual to serve as “an instrument for fostering public adherence to an ideological point of view he finds unacceptable.”³⁸

Framed by these premises, the issue in *Wooley* emerged as “whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public.”³⁹ The Court’s conclusion was telegraphed by its description of the law as forcing the Maynards to act as a “mobile billboard” for purveying an “ideological message” that they found “morally objectionable.”⁴⁰ Specifically, the Court determined that the state could attain its legitimate purposes by “less drastic means” than making unwilling individuals “courier[s]” for its chosen message.⁴¹ Moreover, the strength of the state’s interest in promoting ideas associated with the motto was diminished by its lack of ideological neutrality.⁴²

35. *Maynard v. Wooley*, 406 F. Supp. 1381, 1384 n.3 (D.N.H. 1976), *aff’d*, 430 U.S. 705 (1977).

36. *Wooley*, 430 U.S. at 715 (describing the difference as “essentially one of degree”).

37. *Id.* at 714; *see also Barnette*, 319 U.S. at 633-34.

38. *Wooley*, 430 U.S. at 715.

39. *Id.* at 713.

40. *Id.* at 715; *see* Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 398 (2008) (“The government . . . may not get free advertising through compulsion.”).

41. *Id.* at 716-17.

42. *Id.* at 717; *see* Leora Harpaz, *Justice Jackson’s Flag Salute Legacy: The Supreme Court Struggles to Protect Intellectual Individualism*, 64 TEX. L. REV. 817, 852 n.132 (1986) (describing this interest as form of “reverse viewpoint discrimination”).

Somewhat paradoxically, *Wooley* underscored *Barnette*'s indeterminacy even as it illustrated that decision's stature. Two Justices, while not questioning *Barnette*'s authority, challenged its relevance to New Hampshire's requirement. Unlike the schoolchildren in *Barnette*, argued Justice Rehnquist's dissent, the Maynards had not been placed by the state "in the position of either apparently or actually 'asserting as true' the message" to which they objected.⁴³ Indeed, he asserted, the state's universally mandated display of its motto on noncommercial vehicles had not compelled the Maynards to "say" anything at all. Therefore, neither *Barnette* nor the First Amendment itself was implicated by this law.⁴⁴

B. *Forms of Imposed Access for Communicative Activities:*
Physical Presence and Use of Media

The division over *Wooley* suggests the challenge of shaping negative speech rights outside the discrete circumstance of state-prescribed messages. A major setting for addressing these rights has been government-mandated access for private expression. While the Court has sometimes mustered unanimity in these cases, the different forms they assume point to the complex considerations that they raise. It is doubtful, for example, that attempts to exclude a speaker from one's premises and efforts to prevent use of one's communications medium should be governed by a single animating doctrine. Even within these two broad groupings, each case presents its own distinctive calculus. If the required display of mottos embossed on license plates struck some as far removed from *Barnette*'s concerns,

43. *Wooley*, 430 U.S. at 722 (Rehnquist, J., dissenting). Justice Rehnquist's dissent was joined by Justice Blackmun. *Id.* at 719. Justice White dissented on procedural grounds. *See id.* at 717-19 (White, J., dissenting).

44. *Id.* at 720 (Rehnquist, J., dissenting); see Randall P. Bezanson, *Speaking Through Others' Voices: Authorship, Originality, and Free Speech*, 38 WAKE FOREST L. REV. 983, 1022 (2003) ("[T]he act of displaying the [license] plate cannot be an act of speech for purposes of the First Amendment."). But see Stephen Clark, *Judicially Straight?* *Boy Scouts v. Dale and the Missing Scalia Dissent*, 76 S. CAL. L. REV. 521, 581 (2003) ("As with *Barnette*, the law [in *Wooley*] singled out speech or expressive conduct for special compulsion precisely because of its communicative aspects."); Stephen W. Gard, *The Flag Salute Cases and the First Amendment*, 31 CLEV. ST. L. REV. 419, 448 (1982) ("*Wooley* and *Barnette* are[] . . . not merely analogous, but doctrinal twins.").

coherent translation of *Barnette's* philosophy to these varied issues seems even more problematic.

1. *Barring Uninvited Speakers: The Limits of Resistance.* In a trilogy of cases, the Court faced contentions that the forced presence of outside speakers infringed on the right to convey only messages of the plaintiff's choosing. The venues from which exclusion was sought ranged from a shopping center to law schools to a public parade. The assertion in two of these cases of an additional negative speech claim, the right of expressive association,⁴⁵ further highlights the pitfalls of facile classification in this realm.

In the first of these cases, *PruneYard Shopping Center v. Robins*,⁴⁶ the Court reined in the more far-reaching implications of *Wooley*. *PruneYard* involved a group of high school students soliciting signatures for a petition in opposition to a United Nations resolution against "Zionism."⁴⁷ They set up a table for this purpose at PruneYard, a privately owned shopping center in Campbell, California.⁴⁸ Told to leave because they were violating PruneYard's regulations, they sought an order granting them access to the shopping center.⁴⁹ Ultimately, the California Supreme Court ruled that the students were entitled under the state constitution to conduct their activity at PruneYard.⁵⁰ On appeal to the United States Supreme Court, PruneYard argued that *Wooley* represents the sweeping principle that "a private property owner has a

45. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 69 (2006); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 580 (1995). See *infra* text accompanying notes 281-85 (discussing *FAIR* and *Hurley*). These two cases are treated principally in this section because their predominant element was forced access, not a governmentally backed effort by outsiders to join the claimant's association.

46. 447 U.S. 74 (1980).

47. *Robins v. PruneYard Shopping Ctr.*, 592 P.2d 341, 342 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980).

48. *PruneYard*, 447 U.S. at 77; *Robins*, 592 P.2d at 342.

49. *Robins*, 592 P.2d at 342.

50. *Id.* at 347.

First Amendment right not to be forced by the State to use his property as a forum for the speech of others.”⁵¹

The Court’s opinion rejecting PruneYard’s position distinguished *Wooley* from the dispute before it in several ways. First, the character of the shopping center as a commercial establishment open to the public meant that observers would probably not identify the views expressed by the students with those of PruneYard’s owner.⁵² Moreover, in contrast to New Hampshire’s imposition of its motto, California left the selection of messages to members of the public without preferring a particular viewpoint.⁵³ Finally, PruneYard could dispel any danger that someone might misinterpret a speaker’s views as PruneYard’s own simply by posting a disclaimer of such a connection.⁵⁴

Fifteen years later, the Court confronted the issue of forced access in a case whose setting was quite different from *PruneYard*’s. In *Hurley v. Irish-American Gay, Lesbian*

51. *PruneYard*, 447 U.S. at 85. PruneYard also argued that state compulsion to open the shopping center to the students constituted a taking of property without just compensation under the Fifth Amendment and a deprivation of property without due process under the Fourteenth Amendment. *Id.* at 82. The Court conceded that a literal “taking” had occurred in the sense that “one of the essential sticks in the bundle of property rights is the right to exclude others.” *Id.* On balance, however, the Court found that PruneYard and its owner had failed to show that in this instance “the right to exclude others’ is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to [an unconstitutional] ‘taking.’” *Id.* at 84. Similarly, the Court concluded that California had not committed a violation of due process because the inroad on PruneYard’s property was rationally related to the purpose of promoting expression. *See id.* at 84-85. For criticism of the Court’s rejection of the takings claim, see Richard A. Epstein, *Takings, Exclusivity and Speech: The Legacy of PruneYard v. Robins*, 64 U. CHI. L. REV. 21, 52-53 (1997); Gregory C. Sisk, *Returning to the PruneYard: The Unconstitutionality of State-Sanctioned Trespass in the Name of Speech*, 32 HARV. J.L. & PUB. POL’Y 389, 412-13 (2009).

52. *PruneYard*, 447 U.S. at 87.

53. *Id.* (“[N]o specific message is dictated by the State [under California’s requirement].”); see James P. Madigan, *Questioning the Coercive Effect of Self-Identifying Speech*, 87 IOWA L. REV. 75, 114 (2001) (“[C]ompelled speech claims are weaker when [there is] diminished fear of government favoritism or retribution.”). *But see PruneYard*, 447 U.S. at 98-100 (Powell, J., concurring) (asserting that the right to refrain from speaking would be violated where the message is chosen by third-party speaker if the property owner’s objection to the message was sufficiently strong to make owner feel compelled to disavow it).

54. *PruneYard*, 447 U.S. at 87.

and Bisexual Group of Boston, Inc.,⁵⁵ the respondent organization ("GLIB") sought to march in South Boston's St. Patrick's Day parade under its own banner.⁵⁶ The South Boston Allied War Veterans Council, a private association charged with organizing the parade, refused to allow GLIB to march as a separate contingent in this manner.⁵⁷ Applying Massachusetts public accommodations law, state courts ordered GLIB's admission to the parade.⁵⁸ The Court in turn struck down the order, its opinion largely concerned with the threshold issue of whether the parade should be treated as cognizable expression. In the Court's view, it was not necessary for the parade to project a coherent "particularized message" to trigger First Amendment protection.⁵⁹ Rather, the organizers' selection and combination of "multifarious voices" sufficed to merit recognition of their activity as speech.⁶⁰

Seen in this light, the involuntary inclusion of GLIB's contingent and banner would inject a dissonant note into the Council's expressive composition.⁶¹ Their presence would signify the belief that gay, lesbian, and bisexual persons of Irish descent have the same claim to social acceptance and Irish identity as their heterosexual counterparts.⁶² Whatever the Council's reason for excluding this message from the parade, it enjoyed a constitutional prerogative "not

55. 515 U.S. 557 (1995).

56. *Id.* at 560-61.

57. *Id.* The parade organizers did not object to gay and lesbian participants marching as individuals. *See id.* at 572.

58. *See id.* at 561-64.

59. *Id.* at 574.

60. *Id.* at 569-70.

61. *See id.* at 574 (analogizing the organizers' exercise of discretion in forming a parade to a composer's creation of a score).

62. *Id.*; see Gregory J. Wartman, *Freedom of Discrimination?: The Conflict Between Public Accommodations' Freedom of Association and State Anti-Discrimination Laws*, 37 J. MARSHALL L. REV. 125, 144 (2003) ("The Supreme Court correctly determined that forcing the parade organizers to permit GLIB to march with its banner would be an expressive act that imposed the organization's message upon them."); Tobias Barrington Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy*, 63 BROOK. L. REV. 1141, 1190 (1997) ("[T]he Court recognized that the [Council] had a vital interest in controlling the public's perception of its identity as an Irishness that is naturally and necessarily heterosexual.").

to propound a particular point of view.”⁶³ The state’s attempt to transform the Council’s chosen expression therefore breached the fundamental principle that “a speaker has the autonomy to choose the content of his own message.”⁶⁴

While the Court’s unanimity in *Hurley* suggests the straightforward application of settled doctrine, its dismissal of factors deemed crucial to *PruneYard*’s outcome calls into doubt the existence of transcendent principles. The source of unwanted expression in private speakers had supported California’s forced access to shopping centers, but failed to impress the *Hurley* Court. Though the speech disfavored by the Council had not originated with the state,⁶⁵ GLIB had enlisted the machinery of state power in a way that infringed on the Council’s right to “exclude a message it did not like from the communication it chose to make.”⁶⁶ Further, where *PruneYard* could disavow association with speakers who had thrust themselves on its premises, the Court rejected the possibility of similar recourse to the Council. According to the Court, disclaimers would be impractical in a moving parade.⁶⁷

The third decision on physical access for speakers, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (*FAIR*),⁶⁸ found the regulation involved closer to *PruneYard*’s palatable requirement than to the invalid compulsion in *Hurley*.⁶⁹ At issue was the Solomon Amendment, which provided for equal access to military recruiters to institutions of higher learning on pain of losing certain federal funds.⁷⁰ The Forum for Academic and Institutional Rights (“FAIR”), an association made up of law schools, had objected to military recruiting on member campuses because of the federal policy excluding from the

63. *Hurley*, 515 U.S. at 575.

64. *Id.* at 573.

65. The Court conceded that the Massachusetts law did not facially discriminate against speech based on content. *Id.* at 572.

66. *Id.* at 574.

67. *Id.* at 576-77.

68. 547 U.S. 47 (2006).

69. *Id.* at 65.

70. 10 U.S.C. § 983 (2006).

armed forces persons who had engaged in homosexual acts or declared homosexual identity.⁷¹ According to *FAIR*, the Solomon Amendment placed law schools in the intolerable position of choosing between conveying a military recruiter's message or foregoing federal funds.⁷²

In an emphatic—at times disdainful⁷³—opinion, the Court unanimously⁷⁴ rejected the law schools' assertion that their First Amendment rights had been violated. The Court pointedly denied the asserted similarity between the Solomon Amendment and the state's demand in *Hurley* that GLIB's contingent be allowed to march under its banner in the Veteran Council's parade.⁷⁵ In *Hurley*, as in other instances of improper forced accommodation of another speaker's message, "the complaining speaker's own message was affected by the speech it was forced to accommodate."⁷⁶ Here, by contrast, the law schools' capacity to project their views on the wisdom or morality of official policy on homosexuality in the armed forces would not be impaired by military recruitment activities on their premises. Unlike decisions on the composition of a parade, a law school's serving as host for interviews and recruiting receptions "is not inherently expressive."⁷⁷ Likewise, in contrast to the

71. *FAIR*, 547 U.S. at 52 & n.1 (describing grounds for exclusion (citing 10 U.S.C. § 654 (2006))).

72. *Id.* at 53; see generally Dale Carpenter, *Unanimously Wrong*, 2006 CATO SUP. CT. REV. 217 (endorsing law schools' position). By ruling that Congress could have directly required access for military recruiters, *FAIR*, 547 U.S. at 60, the Court rendered the statute's funding condition irrelevant to its analysis.

73. See, e.g., *FAIR*, 547 U.S. at 62 (asserting that comparing law schools' obligation to send scheduling emails for military recruiters with compelled speech in *Barnette* and *Wooley* "trivializes the freedom protected" in those two decisions); *id.* at 70 ("FAIR has attempted to stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect [and] exaggerate[] the reach of our First Amendment precedents."); see also *infra* note 78.

74. Justice Alito did not participate. *FAIR*, 547 U.S. at 70.

75. See Brief for Respondents at 22, 28, *FAIR*, 547 U.S. 47 (No. 04-1152), 2005 WL 2347175 at *22, *28.

76. *FAIR*, 547 U.S. at 63. The Court had also earlier noted as examples *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986) and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). *Id.*; see *infra* text accompanying notes 94-99, 105-16 (discussing these cases).

77. *FAIR*, 547 U.S. at 64.

practical impediments to disclaimers in a moving parade, law schools could readily take measures to disassociate themselves from military policies.⁷⁸ Moreover, students' awareness that military recruiting was taking place pursuant to federal law made fanciful the fear that they would ascribe military policies to law schools.⁷⁹ Thus, like the owner of PruneYard, schools possessed effective means for averting any risk of misattribution.⁸⁰

2. *Commandeering Media.* However cloudy the theoretical unity of cases involving physical access by speakers, compelled access to communications media presents an even more scattered picture. It is difficult to discern a single conceptual thread running through the four principal decisions on this question. Perhaps the slim generalization that emerges from this limited roster is relative solicitude for the prerogatives of print media.

The first of these decisions, *Red Lion Broadcasting Co. v. FCC*,⁸¹ sustained the FCC's former fairness doctrine

78. See *id.* at 65. But see Erwin Chemerinsky, *Why the Supreme Court Was Wrong About the Solomon Amendment*, 1 DUKE J. CONST. L. & PUB. POL'Y 259, 268 (2006) ("Never before [FAIR] has the Supreme Court said that compelled speech is permissible so long as the speaker is allowed to disavow the forced message and engage in other speech."). See *infra* notes 395-404 and accompanying text (discussing the role of opportunity for disavowal in negative speech rights decisions). In a similar vein, the Court rejected the law schools' claim that the Solomon Amendment violated the law schools' freedom of expressive association. *FAIR*, 547 U.S. at 68-69. Given the continued ability to criticize the military's message, the statute did not "affect[] the composition of the group by making group membership less desirable." *Id.* at 69-70. For discussion on the right of expressive association, in particular the negative right to exclude, see *infra* Part I.E.

79. See *FAIR*, 547 U.S. at 65 ("[H]igh school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so[.] . . . Surely students have not lost that ability by the time they get to law school." (citation omitted)).

80. *Id.* In addition, the Court brusquely rejected the law schools' reliance on *Barnette* and *Wooley*, finding the recruiting assistance required of the schools "a far cry" from the compelled speech in those cases. *Id.* at 62. The Court also responded to the schools' contention that their gesture of barring military recruiters amounted to protected expressive conduct. In the Court's analysis, enforcement of the Solomon Amendment met the test for regulation of such conduct promulgated in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). *FAIR*, 547 U.S. at 65-68.

81. 395 U.S. 367 (1969).

requiring presentation and fair coverage of public issues by broadcasters.⁸² The Court viewed the broadcasters as asserting the negative speech principle that no one "may be prevented . . . from refusing in his speech or other utterances to give equal weight to the views of his opponents."⁸³ Whatever the force of this position in other contexts, the Court believed it was constrained here by the dynamics of broadcast transmission. With a finite number of frequencies available, government had been drawn into allocating broadcast licenses to prevent conflicting signal transmissions.⁸⁴ The Court's constitutional logic thus hinged on spectral scarcity: "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."⁸⁵ The government could therefore direct a licensee to act as a "proxy or fiduciary" rather than exploit monopolistic privilege to bar other perspectives from the airwaves.⁸⁶ In recognizing the public's right to "receive suitable access to social, political, esthetic, moral, and other ideas and experiences," the Court recast the broadcasters' version of the vital First Amendment values at stake: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."⁸⁷

Over four decades after *Red Lion*, the implications of its scarcity rationale for negative speech rights remain unsettled. Though the Court had intimated an inherent right of access to broadcast media,⁸⁸ it declined to order

82. The doctrine was later abolished by the FCC. See *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989) (upholding FCC's action).

83. *Red Lion*, 395 U.S. at 386.

84. See *id.* at 387-91.

85. *Id.* at 388; see also Monroe E. Price, *Taming Red Lion: The First Amendment and Structural Approaches to Media Regulation*, 31 FED. COMM. L.J. 215, 227-28 (1979) ("[I]n broadcasting, there can be rules concerning the allocation of time among competing users so that there is some fairness in the distribution of what is a scarce resource.").

86. *Red Lion*, 395 U.S. at 389.

87. *Id.* at 390.

88. See *id.* ("The right of the public to receive suitable access to . . . ideas and experiences . . . may not constitutionally be abridged either by Congress or by the FCC.").

broadcasters to air paid editorial advertisements in the absence of a federal mandate.⁸⁹ In upholding restrictions on broadcasters' own chosen content, the Court has invoked justifications other than spectrum limitations.⁹⁰ More fundamentally, the phenomenon of scarcity itself has been called into question in the face of proliferation of electronic media and capacity. The Court had grounded its reasoning in *Red Lion* in the "present state" of technology,⁹¹ and as long ago as 1984 raised doubts about the scarcity upon which heightened obligations for broadcasters were premised.⁹² More recently, numerous commentators have declared a regime of disparate protection for various media technologically outmoded.⁹³

Nevertheless, *Red Lion* remains formal precedent, and stands in conspicuous contrast to the Court's holding five years later in *Miami Herald Publishing Co. v. Tornillo*.⁹⁴ There, the Court struck down Florida's "right of reply" statute entitling a political candidate to space in a newspaper to respond to the newspaper's criticism of the

89. *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 121 (1973) (Burger, C.J., plurality opinion) (rejecting First Amendment challenge to broadcaster's refusal to air editorial advertisement).

90. *See FCC v. Pacifica Found.*, 438 U.S. 726, 749-51 (1978) (upholding FCC restriction on radio broadcast of comedian's "Filthy Words" monologue); *id.* at 748 (noting broadcast media's "uniquely pervasive presence").

91. *Red Lion*, 395 U.S. at 388.

92. *See FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984) (acknowledging criticism of spectrum scarcity rationale as having been rendered "obsolete" by technological developments).

93. *See, e.g.,* Michael M. Epstein, *Broadcast Technology as Diversity Opportunity: Exchanging Market Power for Multiplexed Signal Set-Asides*, 59 FED. COMM. L.J. 1, 11-13 (2006); Brittney Pescatore, Note, *Time to Change the Channel: Assessing the FCC's Children's Programming Requirements under the First Amendment*, 33 COLUM. J.L. & ARTS 81, 85-90 (2009); Josephine Soriano, Note, *The Digital Transition and the First Amendment: Is It Time to Reevaluate Red Lion's Scarcity Rationale?*, 15 B.U. PUB. INT. L.J. 341, 343-48 (2006); *see also* *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1820 (2009) (Thomas, J., concurring) ("*Red Lion* and *Pacifica* were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity."). *See generally* Jim Chen, *Conduit-Based Regulation of Speech*, 54 DUKE L.J. 1359 (2005); Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245 (2003).

94. 418 U.S. 241 (1974).

candidate.⁹⁵ Whatever the possible contribution of this requirement to press responsibility, newspapers could not be required “to publish that which “reason” tells them should not be published.”⁹⁶ Such compulsion would constitute a forbidden “intrusion into the function of editors,” specifically their right under the First Amendment to make unfettered choices about a newspaper’s content, format, and outlook.⁹⁷ In addition to upholding the principle of editorial discretion, the Court also expressed concern over the collateral consequences of Florida’s statute. An obligatory published reply would either heap additional costs on a newspaper or detract from other material that it intended to publish.⁹⁸ The prospect of these “penalties” might dampen publication on controversial matters, as newspapers steered clear of news and commentary potentially falling within the statute.⁹⁹

Tornillo’s holding remains established doctrine.¹⁰⁰ Symptomatic of tensions among dispositions of access requirements, however, the decision occupies an uneasy relationship with both its predecessor *Red Lion* and later cases in which *Tornillo* was invoked to challenge compelled access. The absence of reference to *Red Lion* in the *Tornillo* opinion has been criticized as tacit acknowledgement of friction between the two rulings.¹⁰¹ When plaintiffs in turn relied heavily on *Tornillo* in two subsequent challenges—successfully in *Pacific Gas & Electric Co. v. Public Utilities*

95. *Id.* at 258.

96. *Id.* at 256 (quoting *Associated Press v. United States*, 326 U.S. 1, 20 n.18 (1944)).

97. *Id.* at 258.

98. *Id.* at 256.

99. *Id.* at 257. See also Sacharoff, *supra* note 40, at 345 for a description of the statute’s creation of incentive to avoid certain criticism or coverage as “particularly problematic because it is both content-based and viewpoint discrimination: a newspaper triggers the penalty of carrying another’s message if it discusses a candidate or makes a politically partisan attack.”

100. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010) (citing *Tornillo* with approval).

101. See, e.g., FRED W. FRIENDLY, *THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT* 198 (1975) (“The Supreme Court’s inability to cope with *Red Lion* and *Tornillo* in the same opinion suggests that it recognizes the inherent contradiction of the two cases.”).

*Commission*¹⁰² and vainly in the two identically styled cases of *Turner Broadcasting System v. FCC (Turner I)*¹⁰³ and *Turner II*¹⁰⁴)—the Court was sharply divided in both instances.

In *Pacific Gas*, a plurality of a fractured Court looked heavily to *Tornillo* in striking down an order by the California Public Utilities Commission that required Pacific Gas (“PG&E”) to carry materials of a public-interest group in its monthly billing envelopes. The organization, Toward Utility Rate Normalization (“TURN”), which routinely intervened in PG&E’s ratemaking proceedings, had objected to PG&E’s inclusion of a newsletter that sometimes contained political editorials.¹⁰⁵ The Commission instead determined that the “extra space” in the envelope belonged to ratepayers, and that TURN could use the space four times a year to raise funds and to offer ratepayers views besides those of PG&E.¹⁰⁶

Although PG&E’s newsletter may have borne limited resemblance to traditionally protected media, Justice Powell’s plurality opinion found ample comparison between the Commission’s order and compelled access to newspapers in *Tornillo*. Brushing aside any suggestion that PG&E’s corporate status diminished its First Amendment rights,¹⁰⁷ the plurality condemned the order’s “content-based”

102. 475 U.S. 1 (1986).

103. *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622 (1993).

104. *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180 (1997).

105. *Pacific Gas*, 475 U.S. at 5 (Powell, J., plurality opinion).

106. *Id.* at 5-6.

107. *See id.* at 8 (“The identity of the speaker is not decisive in determining whether speech is protected.”); *accord* *Citizens United v. FEC*, 130 S. Ct. 876, 900 (2010) (“The Court has . . . rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not natural persons.” (internal quotations marks omitted)). For criticism, see Alan Hirsch & Ralph Nader, “*The Corporate Conscience and Other First Amendment Follies in Pacific Gas & Electric*,” 41 SAN DIEGO L. REV. 483 (2004). In addition, *The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 100, 182 (1986) asserts that the Court’s ruling in *Pacific Gas* “demonstrated its hostility to government attempts to equalize effective speech rights in limited fora and departed considerably from its historic rationale for protecting corporate speech.”

character.¹⁰⁸ Here, as under Florida's right-of-reply statute, access hinged on disagreement with the resisting speaker's views.¹⁰⁹ Thus, in both cases, fear of provoking and disseminating a hostile response might deter speakers from commentary on controversial subjects.¹¹⁰ Even where deterrence did not restrain speech, speakers under either regime were forced to associate with speech with which they disagreed.¹¹¹ They might therefore feel compelled to respond to the speech for which they served as an unwilling platform, in violation of the right to choose the topics and content of their expression.¹¹² Finally, Justice Powell deflected the Commission's emphasis on PG&E customers' ownership of the "extra space" that remained in the billing envelope once the bill and required notices were deducted from one ounce.¹¹³ According to Powell, the decision in *Tornillo* did not rest on technical conceptions of property.¹¹⁴ Rather, the underlying constitutional defect was that the statute required the newspaper to circulate a view that it opposed.¹¹⁵ This invasion of editorial judgment did not depend on physical ownership of the paper on which replies were printed.¹¹⁶

An understanding of the relevance of *Tornillo* also figured centrally in the resolution of *Turner I* and *Turner II*; both the context and outcome of *Turner*, however, differed markedly from *Pacific Gas*. At issue were the federal "must carry" rules that required cable operators to make available a certain portion of their signal capacity to local commercial and public broadcast stations.¹¹⁷ *Turner I* focused on the

108. *Pacific Gas*, 475 U.S. at 13-14.

109. *Id.* at 14.

110. *Id.*

111. *Id.* at 15.

112. *See id.* at 15-16.

113. *See id.* at 17.

114. *Id.* at 18.

115. *Id.*

116. *Id.*

117. *Turner I*, 512 U.S. 622, 630 (1993). These provisions had been enacted as part of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460, 1462-63.

level of scrutiny to which the rules should be subjected.¹¹⁸ The Court summarily rejected the government's contention that regulation of cable should be governed by the relatively relaxed review exemplified by *Red Lion*.¹¹⁹ Whatever the continued validity of lenient scrutiny of broadcast regulation, its rationale of spectrum scarcity did not apply to the vastly greater—and potentially unlimited—capacity of cable technology.¹²⁰

By contrast, the Court gave extended consideration to cable operators' argument that *Tornillo*'s strict scrutiny should be applied to nearly automatically invalidate the must-carry rules.¹²¹ The Court explained that *Tornillo* embodied the principle that "[t]he First Amendment protects the editorial independence of the press," and reviewed how Florida's right-of-reply statute and the Commission's order in *Pacific Gas* ran afoul of that principle.¹²² Unlike compelled access for TURN's communications, however, the must-carry provisions differed from the statute in *Tornillo* in a number of important respects. In framing its analysis, the Court had already devoted a substantial portion of its opinion to discussing the rules' content-neutrality,¹²³ noting that "[a]lthough the provisions interfere with cable operators' editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations, the extent of the interference does not depend upon the content of the cable operators' programming."¹²⁴ Confronted with

118. See *Turner I*, 512 U.S. at 636-62.

119. *Id.* at 637-39.

120. *Id.*

121. See *id.* at 653 (describing appellants' position).

122. *Id.* at 653-55.

123. See *id.* at 643-52.

124. *Id.* at 643-44. Four Justices disputed the majority's conclusion that the rules were content-neutral. See *id.* at 674-82 (O'Connor, J., concurring in part and dissenting in part); see also Laurence H. Winer, *The Red Lion of Cable, and Beyond?*—*Turner Broadcasting v. FCC*, 15 CARDOZO ARTS & ENT. L.J. 1, 19 (1997) ("The legislation itself . . . demonstrates the heavy content-based nature of the must-carry rules that should have demanded fatal strict scrutiny."); Karl E. Robinson, *Content Is in the Eye of the Beholder: The Supreme Court Upholds the Constitutionality of the 1992 Cable Act's "Must-Carry" Provisions*, 20 J. CORP. L. 691, 708-11 (1995).

operators' reliance on *Tornillo*, the Court affirmed this characterization of the must-carry rules as a crucial basis for distinguishing its earlier holdings.¹²⁵ While access in *Tornillo* and *Pacific Gas* was granted for response to particular content, the obligation to carry broadcasters' programs was not triggered by any message expressed by cable operators. Rather, local broadcasters enjoyed access irrespective of the content of their programming.¹²⁶

As further grounds for distinction, the Court did not think that the must-carry requirement produced the hazards associated with compelled speech present in *Tornillo*. Involuntary transmission of broadcast programming would not "force cable operators to alter their own messages" in response.¹²⁷ Indeed, "[g]iven cable's history as a conduit for broadcast signals," viewers were hardly likely to identify operators with messages contained in the programs they carried.¹²⁸ Thus, must-carry rules did not pose the risk of incentive to "avoid controversy" that disturbed the *Tornillo* Court.¹²⁹ Moreover, the Court recognized that the technological gulf between newspapers and cable created a disparity in control exerted by these media over their respective audiences.¹³⁰ The asserted analogy to *Tornillo* failed because a newspaper's denial of access could not prevent readers' turning to other publications, whereas a cable operator's monopoly effectively barred viewers' access to programming that it excluded.¹³¹

125. See *Turner I*, 512 U.S. at 655 (majority opinion).

126. *Id.*

127. *Id.*

128. *Id.* But see *The Supreme Court, 1993 Term—Leading Cases*, 108 HARV. L. REV. 139, 268 (1994), for a discussion of the Court's rationales as unconvincing because prohibition on compelled speech "is based upon whether the cable operator is forced to distribute speech that he would not otherwise have chosen to distribute."

129. *Turner I*, 512 U.S. at 656 (quoting *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257 (1974)).

130. *Id.*

131. *Id.* ("[A] cable operator [has] bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home [and] can thus silence the voice of competing speakers with a mere flick of the switch.").

Having rejected strict scrutiny and found the must-carry rules content-neutral, the Court settled on intermediate scrutiny as the appropriate standard of review.¹³² Congress had justified the rules as advancing “three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.”¹³³ Though satisfied with the sufficiency of these interests,¹³⁴ a majority of the Court was unwilling to conclude on the record before it that the rules did not “suppress ‘substantially more speech than . . . necessary’” to further those interests.¹³⁵ Rather, proceedings to produce “a more thorough factual record” were deemed necessary to resolve this question.¹³⁶

Ultimately, after “another 18 months of factual development on remand ‘yielding a record of tens of thousands of pages’ of evidence,”¹³⁷ the Court in *Turner II* concluded that the government had demonstrated both the asserted danger to broadcast television¹³⁸ and the absence of substantially less intrusive alternatives to address the threat.¹³⁹ The Court reasoned that “[b]ecause the burden imposed by must-carry is congruent to the benefits it affords,” the must-carry provisions were “narrowly tailored to preserve a multiplicity of broadcast stations for the 40 percent of American households without cable.”¹⁴⁰ While the dissenters accused the majority of having abdicated its duty to conduct an independent evaluation of pertinent facts,¹⁴¹

132. *Id.* at 661-62.

133. *Id.* at 662.

134. *See id.* at 662-64.

135. *Id.* at 668 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)) (explaining requirement that regulation be narrowly tailored to promote government’s interest).

136. *Id.* (Kennedy, J., plurality opinion).

137. *Turner II*, 520 U.S. 180, 187 (1997) (citation omitted).

138. *See id.* at 208-13.

139. *See id.* at 213-25. Four Justices dissented. *See id.* at 229 (O’Connor, J., dissenting).

140. *Id.* at 215-16 (majority opinion).

141. *See id.* at 232 (O’Connor, J., dissenting). For criticism of the various economic theories advanced in the Court’s opinion, see Nancy Whitmore,

the Court stated its refusal to “displace Congress’ judgment respecting content-neutral regulations,” which was made in furtherance of a policy “grounded on reasonable factual findings supported by [substantial] evidence.”¹⁴²

C. *Mandatory Disclosure of Facts: The Persistent Impact of the Commercial Speech Doctrine*

Cases concerning citizen affirmation of state messages and access to private premises for expressive activity have involved objections to serving as vehicles for others’ viewpoints. The Court, on the other hand, has developed a separate analysis for challenges to compelled disclosure of facts. With factual statements, the Court has broadly distinguished between latitude to require provision of information in the commercial realm and a sterner attitude toward efforts to force disclosure in the context of “fully protected”¹⁴³ speech. This twofold distinction stands in notable juxtaposition to the Court’s rejection of a sharp dichotomy between fact and opinion in defamation¹⁴⁴ and its growing reluctance to extend lesser protection to commercial speech in other respects.¹⁴⁵

Congress, the U.S. Supreme Court and Must-Carry Policy: A Flawed Economic Analysis, 6 COMM. L. & POL’Y 175, 203-05, 208-11 (2001).

142. *Turner II*, 520 U.S. at 224 (majority opinion).

143. *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988); see also *infra* notes 169-76 and accompanying text (discussing *Riley*).

144. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990) (refusing to recognize “a wholesale defamation exemption for anything that might be labeled ‘opinion’”).

145. See *Sorrell v. IMS Health Inc.*, No. 10-779, slip op. at 1-3 (U.S. June 23, 2011) (striking down a statute that forbade health insurers, pharmacies, and similar entities from selling, or using for marketing, information identifying the prescribers of prescription drugs); *id.* at 22 (“[T]he ‘fear that people would make bad decisions if given truthful information’ cannot justify content-based burdens on speech.” (citing *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002))); 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (Stevens, J., plurality opinion) (“[W]hen a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.”). See also *Developments in the Law—Corporations and Society*, 117 HARV. L. REV. 2169, 2275-82 (2004) (providing an overview of the Court’s broadening protection of commercial speech that is not false or misleading).

The Court intimated commercial speech's susceptibility to special disclosure requirements even as it gave unprecedented recognition to commercial expression in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*¹⁴⁶ That decision struck down Virginia's ban on advertising the prices of prescription drugs.¹⁴⁷ To the Court, the State's fear that advertising would undermine the pharmaceutical profession by luring consumers to the cheapest rather than best pharmacists¹⁴⁸ reflected an impermissibly "paternalistic" philosophy.¹⁴⁹ Instead, the First Amendment enforced the judgment that "the dangers of suppressing information" outweigh "the dangers of its misuse if it is freely available."¹⁵⁰ At the same time, the Court indicated that certain attributes of commercial speech—especially "objectivity" and "hardiness"—justified heightened regulation if reasonably designed to insure that "the flow of truthful and legitimate commercial information is unimpaired."¹⁵¹ As a corollary that modified negative rights in this area, the Court noted that these features of commercial speech may "make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive."¹⁵² A later pronouncement broadened the grounds for governmental insertion of content into commercial communications: viz., "warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer *confusion* or deception."¹⁵³ Indeed, the Court has endorsed such

146. 425 U.S. 748 (1976).

147. *Id.* at 752, 773.

148. *Id.* at 768.

149. *Id.* at 769-70.

150. *Id.* at 770.

151. *Id.* at 771-72 n.24.

152. *Id.*

153. *In re R.M.J.*, 455 U.S. 191, 201 (1982) (emphasis added); *see also* *Bates v. State Bar*, 433 U.S. 350, 384 (1977) (declining to foreclose the possibility of requiring warning or disclaimer in advertisement of type held protected from ban in order to avoid misleading consumers).

requirements as less restrictive alternatives to outright prohibitions of potentially harmful advertising.¹⁵⁴

Most notably, the Court elaborated on principles governing compulsory disclosure of factual information by commercial speakers in *Zauderer v. Office of Disciplinary Counsel*.¹⁵⁵ There, an attorney challenged Ohio's requirements that advertisements offering contingent-fee rates disclose whether the calculation of the contingent fee included court costs and expenses, and inform clients of their liability for costs even if their claims failed.¹⁵⁶ Though conceding that the constitutional right not to speak was implicated by these rules,¹⁵⁷ the Court distinguished the speaker's lesser interest in this commercial sphere from those discussed in *Wooley*, *Tornillo*, and *Barnette*. Ohio had not sought to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."¹⁵⁸ Rather, the state had merely directed attorneys to "include in [their] advertising purely factual and uncontroversial information about the terms under which [their] services will be available."¹⁵⁹ Since protection of commercial speech is "justified principally by the value to consumers of the information such speech provides," the Court found *Zauderer's* First Amendment interest "in *not* providing any particular factual information in his advertising [to be] minimal."¹⁶⁰ Accordingly, though "unjustified or unduly burdensome" disclosure requirements could violate the First Amendment, requirements like Ohio's would be sustained if

154. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 565 (1980).

155. 471 U.S. 626 (1985).

156. *Id.* at 633. The latter regulation arose from concern that a significant number of potential clients would not grasp the distinction between "legal fees" and "costs." See *id.* at 652.

157. See *id.* at 650.

158. *Id.* at 651 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

159. *Id.*

160. *Id.*

they were “reasonably related to the State’s interest in preventing deception of consumers.”¹⁶¹

Though *Zauderer* announced a lenient standard for compelled disclosure of pertinent information about proposed commercial transactions, it left questions about the occasions for applying this scrutiny. First, as *Milavetz* recently demonstrated, it is not always self-evident whether the required communication provides no more than “purely factual and uncontroversial” information.¹⁶² There, the Court upheld the obligation of attorneys who provide bankruptcy-assistance services to identify themselves as a “debt relief agency” as a straightforward implementation of *Zauderer*.¹⁶³ While the designation was technically accurate under the Court’s interpretation of the relevant statute,¹⁶⁴ it lacked the objective and unexceptionable character of *Zauderer*’s distinction between legal costs and fees. However tendentious the plaintiff law firm’s complaint of

161. *Id.* The Court determined that the application to *Zauderer* of the requirement that clients’ liability for costs be disclosed was sufficiently reasonable to meet this standard. *Id.* at 652-53. For an argument that *Zauderer* authorizes mandatory disclosure in pursuit of a much wider range of interests than averting deception, see Kathleen M. Sullivan & Robert C. Post, *It’s What’s for Lunch: Nectarines, Mushrooms, and Beef—The First Amendment and Compelled Commercial Speech*, 41 LOY. L.A. L. REV. 359, 374 (2007) (statement of Post) (“*Zauderer* created a regime that allowed government routinely to mandate the disclosure of information in order . . . not merely to prevent deception, but to make markets more efficient.”). See generally Caren Schmulen Sweetland, Note, *The Demise of a Workable Commercial Speech Doctrine: Dangers of Extending First Amendment Protection to Commercial Disclosure Requirements*, 76 TEX. L. REV. 471 (1997) (discussing the government’s interest in maintaining the free flow of consumer information and an honest and open market).

162. The decision in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 465, 472, 477 (1997), rejecting a First Amendment challenge to an assessment of fruit producers for generic advertising of their products, can be seen as hinging on the premise that the advertising at issue was “uncontroversial.” The Court also assumed, however, that the advertising presented a viewpoint rather than purely factual information. See *id.* at 470 (“[I]t is fair to presume that [the producers] agree with the central message of the speech that is generated by the generic program.” (emphasis added)); see also *infra* notes 241-52 and accompanying text (discussing *Glickman*).

163. See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1340-41 (2010).

164. See *id.* at 1331-33 (construing Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23).

the “pejorative” nature of this “compelled self-branding,”¹⁶⁵ it was not alone in questioning whether the label would be generally understood as signaling the factual content the government ascribed to it.¹⁶⁶ Judicial grappling with whether allegedly libelous statements contain factual assertions¹⁶⁷ counsels against facile characterization of required commercial speech as devoid of subjectivity or controversy.

Even where the factual nature of compelled disclosure is unambiguous, *Zauderer*’s two-tiered approach toward forced insertion of information did not address communications that contain both commercial and fully protected expression.¹⁶⁸ Three years later, the Court in *Riley v.*

165. Brief for Petitioners at 88, *Milavetz*, 130 S. Ct. 1324 (Nos. 08-1119, 08-1225), 2009 WL 2841179 at *88.

166. See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 355 B.R. 758, 767 (D. Minn. 2006) (“The public is more likely to be confused by an advertisement containing this Congressionally-invented term than one which advertises the services of a bankruptcy attorney.”), *aff’d in part, rev’d in part*, 541 F.3d 785 (8th Cir. 2008), *aff’d in part, rev’d in part*, 130 S. Ct. 1324 (2010); see also Marisa Terranova, *Attorneys as Debt Relief Agencies: Constitutional Considerations*, 13 FORDHAM J. CORP. & FIN. L. 443, 444 (2008) (describing the provision as “baffling”). According to the Court, statements that must or could be included in advertisements—for example, that the advertiser “help[s] people file for bankruptcy relief”—would dispel potential misunderstanding. *Milavetz*, 130 S. Ct. at 1341 (internal quotation marks omitted). This position, however, assumes that the term “debt relief agency” would not alienate potential clients unwilling to further examine or investigate an attorney’s status. A more extreme hypothetical statute illustrates the problem. If personal injury lawyers who offered representation at a certain contingency fee were required to identify themselves by an official designation of “ambulance chasers,” it is doubtful that clarifying language would entirely offset the unsettling impact of that term. See *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 953 (9th Cir. 2009) (striking down required label of “violent video game”), *aff’d on other grounds sub nom.* *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011); see also *infra* notes 395-401 and accompanying text (discussing the efficacy of disclaimers).

167. See *supra* note 144 and accompanying text; see also Robert D. Sack, *Protection of Opinion Under the First Amendment: Reflections on Alfred Hill, “Defamation and Privacy Under the First Amendment,”* 100 COLUM. L. REV. 294, 322-24 (2000). See generally Richard H.W. Maloy, *The Odyssey of a Supreme Court Decision About the Sanctity of Opinions Under the First Amendment*, 19 Touro L. REV. 119 (2002).

168. *Pacific Gas* arguably intimated strict scrutiny in such instances. See *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 9 (1986); see also Antony Page & Katy Yang, *Controlling Corporate Speech: Is Regulation Fair Disclosure*

*National Federation of the Blind of North Carolina, Inc.*¹⁶⁹ clarified that the presence of commercial elements would not automatically disqualify a message from heightened First Amendment protection. *Riley* struck down a North Carolina law requiring professional fundraisers to disclose to potential donors the percentage of donations actually turned over to charities over the past twelve months.¹⁷⁰ The State had argued that its regulation of the profit-generating aspect of charitable solicitations warranted less stringent review under the Court's commercial speech framework.¹⁷¹ In response, however, the Court rejected the proposition that "speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech."¹⁷² Instead, the Court declared that "where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase."¹⁷³ Nor would the Court accept the contention that the interest in resisting compelled speech was of a lesser magnitude than in overcoming restrictions on speech, for it had already established "[t]he constitutional equivalence of compelled speech and compelled silence in the context of fully

Unconstitutional?, 39 U.C. DAVIS L. REV. 1, 56 (2005). The essence of the expression that the Commission sought to inject into PG&E's newsletter, however, was clearly opinion. See *Pacific Gas*, 475 U.S. at 6 (Powell, J., plurality opinion) (noting Commission's goal of exposing ratepayers to a "variety of views" by including TURN's newsletter in PG&E's billing statement (citation and internal quotation marks omitted)).

169. 487 U.S. 781 (1988).

170. *Id.* at 795-801.

171. *Id.* at 795.

172. *Id.* at 796.

173. *Id.* Though the solicitation in *Riley* offers an obvious vehicle for applying this principle, the mix of commercial and noncommercial components needed to trigger heightened scrutiny may not always be clear. For restrictions of advertising that include commentary on public issues and other noncommercial topics, the Court has routinely applied its standard for commercial speech. See, e.g., *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989) (stating that company's discussion of noncommercial matters could be readily separated from selling products); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68 (1983) (noting company's ability to address elsewhere public issues discussed in advertisement); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562 n.5 (1980) (refusing to extend full protection to advertising that only "links a product to a current public debate").

protected expression.”¹⁷⁴ Therefore, the Court ruled, “content-based regulation” like North Carolina’s—even where the content may have met *Zauderer*’s premise of “purely factual and uncontroversial” information¹⁷⁵—must be subjected to “exacting First Amendment scrutiny.”¹⁷⁶

D. *The Variegated Problem of Subsidies*

Perhaps no field more amply illustrates the complexities and particularities of negative speech rights than assessments exacted to support others’ expression. The phenomenon of compelled subsidies has arrived at the Court in a number of forms. Though the entire area is ostensibly governed by the Court’s seminal holding in *Abood v. Detroit Board of Education*,¹⁷⁷ this body of decisions does not really comprise a cohesive whole. Rather, challenges to such subsidies have arisen in at least three discernible sets of circumstances. *Abood* can fairly be said to have directly spawned one line of these cases; the application of *Abood*’s reasoning to the other two scenarios has been considerably more strained and attenuated.

1. *Assessing Beneficiaries of Private Associations.* *Abood* called upon the Court to determine the extent to which forced contributions for expressive activities are considered tantamount to compelled speech, the purposes for which an association may mandate fees from its members and similarly situated beneficiaries, and the means of apportioning funds to avoid trenching on First Amendment

174. *Riley*, 487 U.S. at 797.

175. See R. George Wright, *Free Speech and the Mandated Disclosure of Information*, 25 U. RICH. L. REV. 475, 494 (1991) (describing statute in *Riley* as requiring “only a brief, impersonal, presumably correct and uncontested statement of fact”).

176. *Riley*, 487 U.S. at 798. For criticism that *Riley* grants excessive protection to compelled speech, see David W. Ogden, *Is There a First Amendment “Right to Remain Silent”?*, 40 FED. B. NEWS & J. 368, 370-71 (1993) and see also Leslie G. Espinoza, *Straining the Quality of Mercy: Abandoning the Quest for Informed Charitable Giving*, 64 S. CAL. L. REV. 605, 625 (1991) (“The *Riley* Court[’s] presumption of] an inherent intertwining of advocacy and solicitation [which] undermines the real programmatic value of advocacy and public education by equating it with the public awareness accomplished by the usual straightforward request for money.”).

177. 431 U.S. 209 (1977); see also *infra* notes 178-91 and accompanying text.

rights.¹⁷⁸ In later decisions, the Court both refined *Abood*'s analysis and applied it beyond the union setting in which it had originated. Judging by the unanimity of its most recent decision in this sphere,¹⁷⁹ the Court has apparently attained significant stability in the specific domain of *Abood*'s most obvious application.

Abood itself involved a dual challenge to an "agency shop" clause in a public teacher union's collective bargaining agreement with the state.¹⁸⁰ Under state law a union chosen by a majority of teachers was obligated to represent all teachers, including those who declined to join the union.¹⁸¹ The agency-shop provision in turn required nonunion teachers to pay service charges to the union equal to the dues paid by union members.¹⁸² Challenging these dues on First Amendment grounds, a group of nonunion teachers asserted both their fundamental opposition to collective bargaining in the public sector and their specific dissent from the union's engaging in "activities and programs" of which they disapproved.¹⁸³ The Court acknowledged that employees' compelled financial support affected their First Amendment rights when they held "ideological objections" to the union's performance of its role as exclusive bargaining representative.¹⁸⁴ Nevertheless, the Court determined that this impact was outweighed by the state's interests in promoting peaceful labor relations and

178. See *infra* text accompanying notes 179-91.

179. See *Locke v. Karass*, 129 S. Ct. 798 (2009). Three Justices concurred but also joined the opinion of the Court. *Id.* at 808 (Alito, J., concurring). See also *infra* notes 215-17 and accompanying text (discussing *Locke*).

180. *Abood*, 431 U.S. at 209.

181. *Id.* at 212 & n.1.

182. *Id.* at 212.

183. *Id.* at 212-13 (internal quotation marks omitted).

184. *Id.* at 222 (noting employee's potential objection, for example, to union's negotiated policy on abortion under medical benefits plan or racial discrimination in hiring). For a skeptical view of the proposition that compelled subsidization infringes First Amendment liberty, see Gregory Klass, *The Very Idea of a First Amendment Right Against Compelled Subsidization*, 38 U.C. DAVIS L. REV. 1087 (2005).

avoiding "free riders" who enjoy the fruits of union representation without paying for them.¹⁸⁵

The Court, however, took a dimmer view of compelled subsidies for financing "political" activities unrelated to collective bargaining.¹⁸⁶ Such involuntary support implicated the same underlying First Amendment principle that protected financial contributions for the purpose of spreading political messages.¹⁸⁷ The Court invoked as well Thomas Jefferson's pronouncement that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."¹⁸⁸ Thus, mandating employee fees to fund dissemination of the union's politically tinged messages struck at the core First Amendment principle that "an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."¹⁸⁹ The Court recognized the potential difficulty of distinguishing collective bargaining activities eligible for compelled contributions from "ideological" activities, but left the distinction to be fleshed out in more concrete contexts.¹⁹⁰ Even at this stage, though, the Court was prepared to hold that dissenting employees bore the burden of registering their objection and seeking proper apportionment of their fees.¹⁹¹

185. *Abood*, 431 U.S. at 219, 222, 224-25; see also Jennifer Friesen, *The Costs of "Fee Speech"—Restrictions on the Use of Union Dues to Fund New Organizing*, 15 HASTINGS CONST. L.Q. 603, 624-25 (1988) (discussing government's interest in preventing "free riding").

186. The term "collective bargaining" is used here as a shorthand reference to the totality of legitimate purposes for which a union exists. As the *Abood* Court noted, these include contract administration and grievance adjustment. *Abood*, 431 U.S. at 225-26.

187. *Id.* at 234 (citing *Buckley v. Valeo*, 424 U.S. 1, 22-23 (1976)).

188. *Id.* at 235 n.31 (citation and internal quotations marks omitted).

189. *Id.* at 234-35.

190. *Id.* at 236. See generally David B. Gaebler, *Union Political Activity or Collective Bargaining? First Amendment Limitations on the Use of Union Shop Funds*, 14 U.C. DAVIS L. REV. 591 (1981) (discussing this problem).

191. *Abood*, 431 U.S. at 237-42. The Court later elaborated on the procedures by which this rule must be implemented. See *Chi. Teachers Union v. Hudson*, 475 U.S. 292, 303 (1986) (stating that procedure must be "carefully tailored" to minimize infringement on employees' First Amendment rights, and that objecting employees must have fair opportunity to identify the impact of

Thirteen years later, the Court was also prepared to affirm that *Abood*'s analysis transcends the specific setting of unions. In *Keller v. State Bar*,¹⁹² a group of California attorneys asserted that the State Bar was violating their First Amendment rights by spending their compulsory dues to finance ideological or political activities they opposed.¹⁹³ Upon concluding that the State Bar was not a state agency whose expression was shielded by the government speech doctrine,¹⁹⁴ the Court analogized the dynamics of bar associations and unions. In both instances, the need to remove the incentive to would-be "free riders" in large part explained forced assessments of members.¹⁹⁵ While employee benefits from union negotiations are more palpable than those that a lawyer derives from a state bar's activities,¹⁹⁶ a comparable rationale for required dues applies. A state is entitled to decide that "all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort."¹⁹⁷

At the same time, the Court viewed skeptically State Bar activities that did not effectuate the state's interest in regulating the legal profession and improving the quality of legal services.¹⁹⁸ Echoing *Abood*, the Court promulgated "germaneness" as the litmus test for determining the permissible uses of mandatory fees: "The State Bar may . . . fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of

challenged expenditures on their interests and to bring First Amendment claims); *id.* at 310 ("Union's collection of agency fees [must] include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.").

192. 496 U.S. 1 (1990).

193. *Id.* at 4.

194. *Id.* at 11-12. See also *infra* notes 475-89 and accompanying text (discussing the government speech doctrine).

195. *Keller*, 496 U.S. at 12.

196. See *id.*

197. *Id.*

198. See *id.* at 13-14.

those areas of activity.”¹⁹⁹ Further paralleling *Abood*, the Court readily acknowledged that the line between these two classes of activities would not always be obvious.²⁰⁰ Still, the Court found that some of the State Bar’s alleged activities presented no such vexing difficulty, but rather manifestly could not be funded by compulsory dues: for example, endorsements of gun control and a nuclear freeze initiative.²⁰¹

Since *Keller*, the Court’s attention to this area has focused mainly on giving substance to the general distinction between permissible and impermissible uses of compulsory union fees announced in *Abood*. Though the most far-ranging exploration two decades ago produced a fragmented Court in *Lehnert v. Ferris Faculty Ass’n*,²⁰² its more recent opinion in *Locke v. Karass*²⁰³ was endorsed by every Justice. Even in *Lehnert*, Justice Blackmun managed to muster a majority for key portions of his opinion.²⁰⁴ The dissenting employees there had complained that their service fees had been used “for purposes other than negotiating and administering a collective-bargaining agreement.”²⁰⁵ To assess the validity of compelled charges for union activities, the Court distilled a three-part test from prior decisions.²⁰⁶ For an expense to be chargeable to

199. *Id.* at 14; see also Carolyn Wiggin, Note, *A Funny Thing Happens When You Pay for a Forum: Mandatory Student Fees to Support Political Speech at Public Universities*, 103 YALE L.J. 2009, 2015 (1994) (“Organizations can fund political or ideological speech with the mandatory fees of dissenters as long as it is *germane* to the purpose that justifies the compelled association.”).

200. *Keller*, 496 U.S. at 14; see also David F. Addicks, Note, *Renovating the Bar after Keller v. State Bar of California: A Proposal for Strict Limits on Compulsory Fee Expenditure*, 25 U.S.F. L. REV. 681, 704, 708-11 (1991) (discussing lack of clarity in line between chargeable and nonchargeable expenditures).

201. *Keller*, 496 U.S. at 15-16.

202. 500 U.S. 507 (1991).

203. 129 S. Ct. 798 (2009).

204. The case evoked four opinions; substantial parts of Justice Blackmun’s opinion represented the opinion of the Court. *Lehnert*, 500 U.S. at 507.

205. *Id.* at 513.

206. While looking largely to *Abood*, see *id.* at 516-17, the Court also took note of analogous reasoning in cases involving federal labor legislation, see *id.* at 514-16 (discussing, inter alia, *Machinists v. Street*, 367 U.S. 740 (1961) (construing Railway Labor Act)). In addition, the Court cited as relevant its decision in *Ellis*

all members, it must “(1) be ‘germane’ to collective-bargaining activity; (2) be justified by the government’s vital policy interest in labor peace and avoiding ‘free riders’; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.”²⁰⁷

Justice Blackmun’s plurality opinion reflected the potentially intertwined operation of these prongs. At issue in part was a faculty union’s use of dues to fund lobbying in favor of financial support of public employees in general.²⁰⁸ Unwilling to entertain such a spacious notion of germaneness, Justice Blackmun judged the relationship between this activity and the union’s role as bargaining representative “too attenuated” to justify compelled support by dissenting faculty.²⁰⁹ The lack of specific connection to the objecting employees’ own workplace also entered into the provision’s failure to meet the second part of the test. Given the divergence between the employees’ and union’s positions on this broad public policy, labor peace would not be advanced by forcing faculty to finance lobbying efforts to achieve the union’s goal.²¹⁰ Both of these critiques imply that the union’s lobbying in this instance partook more of politics than work conditions. It was therefore unsurprising that Justice Blackmun further concluded that using the plaintiffs’ funds for such “political lobbying” would significantly and unnecessarily add to the existing encroachment on their First Amendment interests.²¹¹ Expenditures for public relations activities designed to enhance the teaching profession similarly foundered on their insufficient link to the union’s collective bargaining function and excessive burden on First Amendment rights.²¹²

v. Railway Clerks, 466 U.S. 435 (1984), sustaining the use of dissenters’ funds for union conventions, publications, and social events, as ancillary to the permissible imposition of an agency shop. *Lehnert*, 500 U.S. at 518-19.

207. *Lehnert*, 500 U.S. at 519.

208. *Id.* at 511.

209. *Id.* at 520 (Blackmun, J., plurality opinion).

210. *See id.* at 521.

211. *See id.* at 521-22.

212. *Id.* at 528-29.

Charges for activities conducted outside the bargaining unit fared better in *Lehnert*, but a crucial application of the principle established would not be resolved until *Locke*. A majority in *Lehnert* agreed that a local bargaining unit could charge objecting employees their pro rata share of costs associated with otherwise chargeable activities of the unit's state and national affiliates.²¹³ To qualify, the activities need only ultimately—not directly—benefit the local unit.²¹⁴ The eligibility of expenses for litigation beyond the dissenting employees' bargaining unit, however, split the *Lehnert* Court into "three irreconcilable factions."²¹⁵ Revisiting the issue in *Locke*, a unanimous Court determined that no peculiar feature of litigation distinguished it from other national activities for which local units could be charged.²¹⁶ Instead, assessments could be imposed where they funded extra-unit litigation that appropriately related to collective bargaining and was reciprocal—i.e., could "ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization."²¹⁷

2. *The Distinctive Problem of Student Activity Fees.* While the Court extended its treatment of union charges to bar association dues, it has not categorically rendered suspect all extraction of funds to support expression with which the objector disagrees.²¹⁸ On the contrary, the framework developed in *Abood* is not easily transplanted to settings and circumstances well-removed from the collective bargaining arena. This difficulty is illustrated in *Board of Regents v. Southworth*,²¹⁹ where the Court acknowledged the limitations of the "germaneness" criterion that evolved from *Abood*.

213. *Id.* at 524.

214. *Id.*

215. *Locke v. Karass*, 129 S. Ct. 798, 805 (2009).

216. *See id.* at 806-07.

217. *Id.* at 806-07 (quoting *Lehnert*, 500 U.S. at 524).

218. The most conspicuous example of this principle is a governmental expenditure for a program that a taxpayer finds repugnant. *See* Norman L. Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 RUTGERS L. REV. 3, 22-23 (1984).

219. 529 U.S. 217 (2000).

In *Southworth*, students at the University of Wisconsin challenged the university's mandatory student activity fee.²²⁰ Some of the funds generated by the fee were allocated to student organizations that engaged in political or ideological speech.²²¹ The plaintiffs asserted that they could not be required to subsidize organizations whose views they opposed.²²² Invoking *Abood* and *Keller* as well as other rulings upholding negative speech rights, they argued that this arrangement clashed with the principle that the First Amendment "broadly prohibits government efforts to force unwilling citizens to contribute to the private speech of others."²²³ The Court agreed that the activity fee entailed a compromise of students' First Amendment rights,²²⁴ but refused to confine this mandatory contribution to speech "germane" to the purposes of the university.²²⁵ In the Court's eyes, such a standard foundered on related practical and philosophical grounds.²²⁶ The university supported a host of student organizations in order to "facilitate a wide range of speech" that was distinguished "not by discernable limits but by its vast, unexplored bounds."²²⁷ Accordingly, a "germaneness" test would prove not only "unworkable"²²⁸ but also "contrary to the very goal the University seeks to pursue."²²⁹

Southworth suggests the "vast" bounds²³⁰ of the range of subsidies that might invite challenge, and the Court's refusal to apply *Abood*'s template there points to a corresponding need for individually tailored analysis. Thus, the *Southworth* Court did not look for primary protection of

220. *Id.* at 221.

221. *Id.*

222. *See id.*

223. *See* Brief for Respondents at 14-18, *Southworth*, 529 U.S. 217 (No. 98-1189), 1999 WL 618376 at *14-*18 (citing, *inter alia*, *Barnette* and *Hurley*).

224. *See Southworth*, 529 U.S. at 231.

225. *Id.* at 231.

226. *Id.* at 231-32.

227. *Id.*

228. *Id.* at 231; *see also id.* at 232 (rejecting alternative requirement to permit each student to list acceptable causes as excessively "disruptive and expensive").

229. *Id.* at 232.

230. *Id.*

objecting students' rights in negative rights jurisprudence at all, but instead in a ruling on *withholding* subsidies from certain groups. In *Rosenberger v. Rector & Visitors of the University of Virginia*,²³¹ the Court invalidated a university's refusal to allow student activity fees to fund any student organizations that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality."²³² Rather, the university was obligated to distribute these funds without regard to the viewpoints of students who applied for them.²³³ Similarly, the student challengers in *Southworth* could find refuge in *Rosenberger's* principle of viewpoint neutrality to guard against ideological bias in the allocation of funds.²³⁴ The parties' stipulation that the university's system for encouraging student speech operated in a content-neutral manner earned the Court's provisional approval of the program.²³⁵ However, a mechanism for subjecting specific allocations to a student referendum²³⁶ threatened that principle by potentially "substitut[ing] majority determinations for viewpoint neutrality."²³⁷ The Court therefore remanded the case for investigation to resolve this question and to assure the program's adherence to the constitutional command of neutrality toward beliefs.²³⁸

3. *Subsidized Generic Advertising's Muddled Trilogy.* The Court has also grappled with obstacles to applying *Abood's* logic in cases involving mandatory charges to producers to fund generic advertising messages. A trilogy of rulings on challenges by objecting producers²³⁹ has resulted in a widely held perception of "doctrinal instability and

231. 515 U.S. 819 (1995).

232. *Id.* at 823 (internal quotation marks omitted).

233. *Id.* at 829-30.

234. *See Southworth*, 529 U.S. at 233.

235. *Id.* at 234.

236. *See id.* at 224-25.

237. *Id.* at 235.

238. *See id.* at 235-36.

239. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457 (1997).

incoherence”²⁴⁰ in the area. In a sense, the disjunction between *Abood* and its wavering application is more jarring here than in *Southworth*, for the economic dynamics of collective bargaining would seem to have more in common with commercial advertising than with the aspirations to intellectual diversity animating the student activity fee.

Even the first of the three decisions, though invoking the “germaneness” test, displayed tension over the relevance of *Abood*’s construct to industry check-off programs. *Glickman v. Wileman Brothers & Elliott, Inc.*²⁴¹ concerned the validity of marketing orders promulgated by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937.²⁴² In particular, the Secretary had launched a generic advertising campaign promoting the virtues of “California Summer Fruits,” which was funded by assessments imposed on producers of these fruits.²⁴³ A group of tree handlers, asserting their disagreement with some of the content of the advertising, challenged the use of mandatory fees to subsidize these messages.²⁴⁴ In response, the Court rejected both reliance on its test for regulation of commercial speech²⁴⁵ and the suggestion that *Abood* “announce[d] a broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities.”²⁴⁶ Rather, *Abood* had more narrowly recognized an interest in “not being compelled to contribute to an

240. Sullivan & Post, *supra* note 161, at 365 (statement of Sullivan); *see also*, e.g., Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer, and Abood*, 40 VAL. U. L. REV. 555, 558 (2006) (referring to “doctrinal uncertainty and embarrassment” that “plagued” Court’s decisions on compelled subsidies for generic advertising); *see also infra* notes 419-20 and accompanying text (discussing arguable inconsistencies among these decisions).

241. 521 U.S. 457 (1997).

242. 7 U.S.C. § 608c(6)(I) (2006). The orders had to be approved by either two-thirds of the affected producers or producers who marketed at least two-thirds of the volume of the commodity. *Glickman*, 521 U.S. at 461-62 (citation omitted).

243. *Glickman*, 521 U.S. at 461-62.

244. *Id.* at 467. One of the messages that the plaintiffs argued was conveyed in the advertising was that “all California fruit is the same.” *Id.* at 468 n.11.

245. *Id.* at 474 (referring to test set forth in *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980)).

246. *Id.* at 471.

organization whose expressive activities conflict with one's 'freedom of belief.'"²⁴⁷ Given the plaintiffs' presumed agreement with the "central" message of the generic advertising campaign, they—unlike the objecting contributors in *Abood* and *Keller*—were not compelled "to endorse or to finance any political or ideological views."²⁴⁸

The conclusion that these forced assessments generated no "crisis of conscience"²⁴⁹ to trigger *Abood*'s protection stirred ambiguity and dissent in *Glickman*. Despite holding that the assessments did not encroach on First Amendment rights, the Court further ruled that the generic advertising at issue was "germane" to the larger purposes of the Secretary's marketing orders.²⁵⁰ Conversely, four dissenters, speaking through Justice Souter, accused the majority of espousing a stunted conception of *Abood*'s reach. Far from excluding commercial and nonideological speech, *Abood*, in their view, stood for the unqualified proposition that compelling expenditures for protected speech impinges on First Amendment rights to the same degree as forbidding such expenditures.²⁵¹ Thus, even if the plaintiffs agreed with the advertisements' bland message of the goodness of California fruit, their preference for making different claims about their products sufficed to activate First Amendment safeguards.²⁵²

Any suggestion that *Glickman* had granted unfettered license to compel subsidies for generic advertising—or even just generic advertising of agricultural products—was dispelled four years later in *United States v. United Foods, Inc.*²⁵³ *United Foods* involved a challenge to a federal law creating a Mushroom Council authorized to impose mandatory assessments on handlers of fresh mushrooms.²⁵⁴

247. *Id.* (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977)).

248. *Id.* at 469-70.

249. *Id.* at 472.

250. *Id.* at 473; see Post, *supra* note 240, at 572 (noting the Court "somewhat mysteriously" applied the germaneness test).

251. See *Glickman*, 521 U.S. at 487-88 (Souter, J., dissenting).

252. See *id.* at 489.

253. 533 U.S. 405 (2001).

254. *Id.* at 408; see also Nicole B. Casarez, *Don't Tell Me What to Say: Compelled Commercial Speech and the First Amendment*, 63 MO. L. REV. 929,

In practice, the bulk of the funds raised by the assessments were spent on generic advertising of mushrooms.²⁵⁵ The plaintiff, a grower and distributor of mushrooms, objected mainly to the advertising's presumed message that mushrooms are generally fungible, effectively contradicting the plaintiff's preferred message that its own mushrooms were superior to other mushrooms.²⁵⁶

With *Glickman* as obvious precedent, the *United Foods* Court identified crucial distinctions in structure and substance from the constitutional assessments for advertising California fruits. While the required subsidies in *Glickman* formed one facet of a "broader regulatory scheme," the "principal object" of forced contributions for advertising mushrooms was "speech itself."²⁵⁷ The absence of a larger regulatory program served by the advertising precluded the possibility of compliance with *Abood*'s "germaneness" test, for it left no purpose to which the campaign could be germane.²⁵⁸ *Abood*'s hostility toward compelled subsidies for speech in "conflict with freedom of belief," on the other hand, had fatal relevance for the obligatory payments in *United Foods*.²⁵⁹ Unlike the presumed harmony of viewpoints between the challengers and sponsors of the advertising in *Glickman*, here the Court perceived the government as prejudicing a disfavored participant in a private debate.²⁶⁰ Moreover, the economic and arguably trivial nature of the disagreement did not preempt First Amendment scrutiny; the Court refused to

960 (1998) (asserting that *Glickman* "constitutes a serious departure from traditional . . . compelled speech analysis").

255. *United Foods*, 533 U.S. at 408 (discussing *Glickman*).

256. *See id.* at 411.

257. *Id.* at 415. Howard Wasserman has characterized *United Foods* as distinguishing between funding expressive and nonexpressive activities. Wasserman, *supra* note 15, at 201 ("[W]here the expressive activity comprises only a small portion of the range of nonexpressive activities engaged in with compelled funds, the program must be understood as nonexpressive, such that payers may not object to any uses of their funds.").

258. *United Foods*, 533 U.S. at 415-16.

259. *See id.* at 413.

260. *See id.* at 411 ("First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors.").

recognize any principle that “distinguishes out of hand minor debates about whether a branded mushroom is better than just any mushroom.”²⁶¹ Nor did the power sustained in *Zauderer*²⁶² to compel disclosure in commercial advertising save the forced assessments in *United Foods*. These assessments, “imposed to require one group of private persons to pay for speech by others,” bore scant resemblance to the *Zauderer* provision’s advancement of the interest in preventing deception in “voluntary advertisements.”²⁶³

While *United Foods* thus displayed the complication attending even this narrow niche of negative speech issues, the final case in the trilogy, *Johanns v. Livestock Marketing Ass’n*,²⁶⁴ raised doctrinal uncertainty to a new level. This time, the disputed advertising campaign promoted consumption of beef, in particular through the familiar slogan “Beef. It’s What’s for Dinner.”²⁶⁵ The advertisements, along with other “beef-related projects,” were funded by a federal tax imposed on sales and imports of cattle.²⁶⁶ The plaintiff beef producers, invoking *United Foods*,²⁶⁷ objected that the advertising’s promotion of beef as a “generic commodity” contradicted their own messages touting the superiority of their beef.²⁶⁸

The Court’s analysis rested on a pair of dichotomies. Canvassing previous decisions, the Court observed that First Amendment challenges had succeeded in both “true ‘compelled-speech’ cases, in which an individual is obliged personally to express a message he disagrees with, . . . and ‘compelled-subsidy’ cases, in which an individual is required

261. *Id.*

262. *See supra* notes 155-68 and accompanying text.

263. *United Foods*, 533 U.S. at 416. *But see* Post, *supra* note 240, at 562-63 (arguing that *United Foods* is in tension with *Zauderer* because *Zauderer* represents the principle that compelled commercial disclosures implicate minimal First Amendment interests and may serve the purpose of “promot[ing] transparent and efficient markets”).

264. 544 U.S. 550 (2005).

265. *Id.* at 554.

266. *Id.*

267. *See* Brief for Respondents at 14-17, *Johanns*, 544 U.S. 550 (Nos. 03-1164, 03-1165) 2004 WL 2362873, at *14-*17.

268. *Johanns*, 544 U.S. at 556.

. . . to subsidize a message he disagrees with.”²⁶⁹ Prior examinations of mandated subsidies, however, had all involved compelled support for the expression of private entities,²⁷⁰ which the Court deemed “fundamentally different from compelled support of government.”²⁷¹ Since the government is entitled to tax citizens to fund programs that they oppose, the Court reasoned, it follows that some of those funds can be spent for expression advocating programs and their underlying policies.²⁷² Accordingly, *Johanns* hinged on whether the promotional messages could be fairly considered the government’s speech.²⁷³ Perhaps counter-intuitively, the Court determined that the advertising—much of it stating “Funded by America’s Beef Producers”—could be formally and functionally ascribed to the government.²⁷⁴ Though the campaign was developed by a committee with substantial private representation,²⁷⁵ its message was “from beginning to end the message established by the Federal Government.”²⁷⁶ Whatever the involvement of nongovernmental actors, the content of the advertising was “effectively controlled by the Federal Government itself.”²⁷⁷ Consistent with the rationale for

269. *Id.* at 557.

270. *Id.*

271. *Id.* at 559 (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 259 n.13 (1977)).

272. *Id.* at 559.

273. See *infra* text accompanying notes 475-83 (discussing further the concept of immunized government speech).

274. *Johanns*, 544 U.S. at 555.

275. See *id.* at 553-54.

276. *Id.* at 560-61. Commentators have echoed Justice Souter’s criticism in *Johanns* that the government’s sponsorship of the beef advertising campaign was too obscure to justify invocation of the government speech doctrine. *Id.* at 577-79 (Souter, J., dissenting). See, e.g., Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 666 (2008) (“Because most advertisements bore the tag ‘Funded by America’s Beef Producers,’ a reasonable person would probably conclude that private cattle ranchers were speaking.”); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 988-89 (2005).

277. *Johanns*, 544 U.S. at 560 (majority opinion); see *id.* at 561 (noting the Secretary of Agriculture exercised “final approval authority over every word used in every promotional campaign”); see also *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 375 (6th Cir. 2006) (“[W]hen the government determines an

distinguishing government speech from private messages, the beef advertisements were subject to political safeguards of the legislative and administrative processes, and of the program's implementation by a "politically accountable official."²⁷⁸ Admittedly, the plaintiffs' First Amendment rights might be implicated if viewers would likely perceive the advertisements as the plaintiffs' expression.²⁷⁹ The record produced by the plaintiffs' facial challenge, however, established no such attribution.²⁸⁰

E. *Group Speech and the Fluctuating Right to Exclude*

As noted earlier, *Hurley* upheld the Veterans Council's right to reject alteration of its chosen message,²⁸¹ while the *FAIR* Court dismissed law schools' claim that the presence of military recruiters impeded their association's ability to convey its viewpoint on the military's policy toward homosexuality.²⁸² In a sense, these decisions addressed negative speech rights in the context of expressive association: the "freedom to engage in association for the advancement of beliefs and ideas."²⁸³ In both cases, the

overarching message and retains power to approve every word disseminated at its behest, the message must be attributed to the government for First Amendment purposes.").

278. See *Johanns*, 544 U.S. at 563. But see Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 631 (2008) (arguing that political accountability did not "provide[] any meaningful check on the government's action" in *Johanns*).

279. See *Johanns*, 544 U.S. at 564 n.7; *id.* at 565 (reserving question of whether as-applied challenge would succeed if record demonstrated that beef advertisements were attributed to plaintiffs). See also *id.* at 568, where Justice Thomas, in his concurrence, assumes the as-applied challenge is valid if the advertisements have associated their message with plaintiffs because government "may not . . . associate individuals or organizations involuntarily with speech by attributing an unwanted message to them, whether or not those individuals fund the speech, and whether or not the message is under the government's control."

280. *Id.* at 565-67. The Court remanded the case, presumably for further fact-finding on whether the advertisements were being identified as the plaintiff beef producers' speech. See *id.* at 567.

281. See *supra* notes 54-67 and accompanying text.

282. See *supra* notes 68-80 and accompanying text.

283. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958); see also Paul M. Secunda, *The Solomon Amendment, Expressive Associations, and Public Employment*, 54

asserted impact of state compulsion on the association's capacity to project its viewpoint was at once direct but ephemeral. While each association resisted affiliation with speakers whose message contradicted its own, these amounted to relatively isolated episodes of forced interaction.²⁸⁴ In other instances, organizations have alleged a more central invasion of their capacity to express ideas: viz., state requirements—typically in the form of antidiscrimination laws—that the organizations grant membership to individuals who allegedly will change or detract from their message.²⁸⁵ Addressing this clash, the Court achieved a tenuous unanimity in *Roberts v. United States Jaycees*,²⁸⁶ but two more recent decisions, *Boy Scouts of America v. Dale*²⁸⁷ and *Christian Legal Society v. Martinez (CLS)*,²⁸⁸ split 5-4, with only Justice Kennedy joining both majorities.

Roberts sustained enforcement of a Minnesota antidiscrimination law forbidding local chapters of the Jaycees to comply with the national organization's exclusion of women from full voting membership.²⁸⁹ The Jaycees, an organization expressly devoted to fostering the civic engagement, personal development, and friendship of "young men,"²⁹⁰ claimed violation of its First Amendment rights, contending that the inclusion of women could change both its goal of promoting the capacities of young men²⁹¹ and

UCLA L. REV. 1767, 1784 (2007) (describing right as "association for the promotion of rights found primarily within the First Amendment").

284. See Sisk, *supra* note 51, at 403 ("Access to campus by any employer, military or otherwise, tends to be infrequent and sporadic.").

285. See *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 69 (2006), for a distinction between laws that grant access to "outsiders who come onto campus for the limited purpose of trying to hire students" from laws that force an organization "to accept members it does not desire" (citation omitted).

286. 468 U.S. 609 (1984); see *infra* note 297-99 and accompanying text.

287. 530 U.S. 640 (2000).

288. 130 S. Ct. 2971 (2010).

289. See *Roberts*, 468 U.S. at 613-17 (discussing Jaycees' by-laws and state's application of public accommodations law).

290. *Id.* at 612-13.

291. See Brief for Appellee at 30, *Roberts*, 468 U.S. 609 (No. 83-724), 1984 U.S. S. Ct. Briefs LEXIS 237 at *30.

its positions on matters of public policy.²⁹² The Court's opinion, supported in full by five Justices,²⁹³ acknowledged a number of principles ostensibly favorable to the Jaycees: the Jaycees' freedom of expressive association encompassed the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends";²⁹⁴ requiring the admission of objectionable members works a manifest intrusion into an association's "internal organization or affairs";²⁹⁵ and state abridgements of this "freedom not to associate" must be subjected to stringent scrutiny.²⁹⁶ Ultimately, however, the Court was "persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms."²⁹⁷ At the same time, the Court did not credit arguments that admission of women would transform messages conveyed by the Jaycees.²⁹⁸ Besides, any "incidental abridgement" of the Jaycees' speech would be

292. *Id.* at 20-21, 31-32.

293. Justice Rehnquist concurred in the judgment without opinion, Justice O'Connor concurred in part and concurred in the judgment, and Chief Justice Burger and Justice Blackmun did not participate. *Roberts*, 468 U.S. at 631.

294. *Id.* at 622.

295. *Id.* at 623.

296. *See id.* (stating that infringements must "serve compelling state interests . . . that cannot be achieved through means significantly less restrictive of associational freedoms"). In a concurring opinion praised by scholars, *see, e.g.*, Dale Carpenter, *Expressive Association and Anti-Discrimination Law after Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1563-87 (2001) (proposing "tripartite" framework developing Justice O'Connor's suggested approach); Douglas O. Linder, *Freedom of Association after Roberts v. United States Jaycees*, 82 MICH. L. REV. 1878, 1896-97 (1984), but spurned by the Court, *see* Julie Manning Magid & Jamie Darin Prenkert, *The Religious and Associational Freedoms of Business Owners*, 7 U. PA. J. LAB. & EMP. L. 191, 218 (2005), Justice O'Connor proposed distinguishing between heightened First Amendment protection of predominantly expressive associations and more permissive scrutiny of infringements on the associational freedom of predominantly commercial associations. *Roberts*, 468 U.S. at 633-36 (O'Connor, J., concurring).

297. *Roberts*, 468 U.S. at 623 (majority opinion); *see also* N.Y. State Club Ass'n v. New York, 487 U.S. 1, 11-12 (1988) (citing *Roberts*, 468 U.S. at 621); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987) (citing *Roberts*, 468 U.S. at 626).

298. *See Roberts*, 468 U.S. at 627-28.

“no greater than is necessary” to attain the state’s purpose of curbing gender discrimination.²⁹⁹

The fragile consensus of the truncated *Roberts* Court was shattered when the decision’s reach was tested in *Dale*. Dale had invoked a New Jersey antidiscrimination statute to overturn his dismissal as assistant scoutmaster due to his homosexuality.³⁰⁰ Upholding the Boy Scouts’ First Amendment challenge to the state court’s ruling, the Court first determined that the organization’s mission to “instill values in young people” amounted to “expressive association.”³⁰¹ Among the values set forth in its mission statement were those of keeping “morally straight” and “clean,” which the Boy Scouts contended were incompatible with homosexual conduct.³⁰² While acknowledging the ambiguity of these terms,³⁰³ the Court deferred to the Boy Scouts’ assertion concerning the nature of its expression.³⁰⁴ The Court declared as well its obligation to defer to “an association’s view of what would impair its expression.”³⁰⁵ Describing Dale as “an avowed homosexual and gay rights activist,”³⁰⁶ the Court acceded to the Boy Scouts’ position that Dale’s presence in the organization would distort its

299. *Id.* at 628; see Linder, *supra* note 296, at 1880 (noting conflict in *Roberts* between “two well-established American principles: associational freedom and equality”). See generally Carpenter, *supra* note 296, at 1533-63 (discussing proper balance between preservation of latitude for group speech and organization and state ability to pursue compelling equality objectives). The Court also rejected the Jaycees’ argument that Minnesota’s law violated the right of intimate association recognized in cases like *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (right of parents to raise children without undue interference from state), and *Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978) (right to marry without confronting discriminatory obstacles imposed by state). See *Roberts*, 468 U.S. at 617-21. The Court found that the Jaycees’ size, entrepreneurial character, and lack of selectivity rendered its membership restrictions “remote from the concerns” underpinning this form of liberty. See *id.* at 620-21.

300. *Boy Scouts of America v. Dale*, 530 U.S. 640, 644-45 (2000).

301. *Id.* at 648-50.

302. *Id.* at 649-50.

303. See *id.* at 650.

304. See *id.* at 651-53.

305. *Id.* at 653; see also *infra* text accompanying notes 405-18 (discussing the problem of deference).

306. *Id.* at 655-56.

message of disapproval of homosexuality.³⁰⁷ As in *Hurley*, forced acceptance of an unwanted participant would impede the association's "choice not to propound a point of view contrary to its beliefs."³⁰⁸

Writing for the four dissenters, Justice Stevens delivered a caustic assessment of the majority's premises and reasoning. Skeptical that the Boy Scouts had assumed a consistent stance against homosexuality,³⁰⁹ Justice Stevens pronounced the Court's deferential approach on this score "an astounding view of the law."³¹⁰ Moreover, Dale's mere membership in the Boy Scouts would not convey the association's endorsement of homosexuality.³¹¹ The majority's contrary conclusion, argued Justice Stevens, meant that "an openly gay male is irreversibly affixed with the label 'homosexual' . . . communicat[ing] a message that permits his exclusion wherever he goes."³¹²

307. *See id.* at 653.

308. *Id.* at 654; *see* Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 MINN. L. REV. 1917, 1932 (2001) ("The Boy Scouts get to control the content of their own parade, so to speak."). The Court distinguished *Roberts* and *Rotary Club* as involving state antidiscrimination laws whose enforcement in those cases "would not materially interfere with the ideas that the organization sought to express." *Dale*, 530 U.S. at 657.

309. *See Dale*, 530 U.S. at 665-78 (Stevens, J., dissenting).

310. *Id.* at 686. But *see* Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 130 (2000), for a challenge to the requirement that the Boy Scouts "express a strong, consistent position from the outset on the immorality of homosexuality in order to preserve its decisional autonomy."

311. *See Dale*, 530 U.S. at 694.

312. *Id.* at 696; *see* Madigan, *supra* note 53, at 102 (denying that the Boy Scouts would be "forced to declare an allegiance to homosexuality just because a gay person is among them"); David McGowan, *Making Sense of Dale*, 18 CONST. COMMENT. 121, 122 (2001) (asserting that the Court has never adopted a theory of "expressive identity" under which "personal characteristics such as race, gender, or sexual orientation are inherently expressive within the meaning of the speech clause"). But *see* Nancy J. Knauer, "Simply so Different": *The Uniquely Expressive Character of the Openly Gay Individual After Boy Scouts of America v. Dale*, 89 KY. L.J. 997, 1071 (2001), for an assertion that Justice Stevens's argument "overlooks . . . the present political reality of what it means to be an openly gay individual" and that though "[i]t certainly seems unfair that Dale's mere presence in a Scoutmaster's uniform sends a message . . . at least for now, it does." Others have argued that even if New Jersey's statute impinged on the Boy Scouts' associational interest, its application in *Dale* deserved to

A decade later in *CLS*, application of a nondiscrimination policy to a group opposing homosexuality evoked another sharp division on the Court. In this instance, however, the sincerity of the association's avowal of an exclusionary philosophy was not questioned. The association, the Hastings College of Law chapter of the Christian Legal Society ("CLS"), sought the law school's recognition as a "Registered Student Organization" ("RSO"), a status accompanied by a number of tangible benefits.³¹³ Hastings rejected the application on the ground that CLS by-laws violated the school's policy of withholding RSO status from student organizations excluding persons on the basis of (among other categories) religion or sexual orientation.³¹⁴ Under tenets prescribed by its parent organization, these by-laws barred persons who engaged in "unrepentant homosexual conduct" or professed religious beliefs different from those set forth in the organization's "Statement of Faith."³¹⁵

While the clash in *CLS* raised large questions of principle,³¹⁶ the legal debate within the Court centered on specific issues of fact, precedent, and doctrine. In Justice Ginsburg's account for the majority, Hastings was applying a "viewpoint-neutral" policy of requiring every student group seeking RSO status to welcome "all comers."³¹⁷ Justice Alito's dissent, reviewing the same record, perceived the school's representation of an all-comers policy as pretext for discrimination against a group with obnoxious views.³¹⁸ By

survive strict scrutiny. See Erwin Chemerinsky & Catherine Fisk, *The Expressive Interests of Associations*, 9 WM. & MARY BILL RTS. J. 595, 612 (2001).

313. *Christian Legal Soc'y v. Martinez (CLS)*, 130 S. Ct. 2971, 2979-80 (2010). RSOs were granted, inter alia, use of school funds and facilities. *Id.* at 2979.

314. *Id.* at 2980.

315. *Id.* (internal quotation marks omitted).

316. See Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 165-66 (2010); Adam Liptak, *Rights and Religion Clash in Court Case*, N.Y. TIMES, Dec. 8, 2009, at A24.

317. See *CLS*, 130 S. Ct. at 2978.

318. See *id.* at 3001-06 (Alito, J., dissenting); see also Hadley Arkes, *Vast Dangers in a Small Place*, FIRST THINGS, June-July 2010, at 33, 34-35; Patricia Millett et al., *Mixed Signals: The Roberts Court and Free Speech in the 2009 Term*, 5 CHARLESTON L. REV. 1, 24-26 (2010). Justice Alito's dissent was joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas. The Court did not entirely rule out the theory of pretextual enforcement; it remanded the case for

extension, the two sides differed over the relevance of *Healy v. James*,³¹⁹ which had overturned a university's denial of official recognition to a local chapter of Students for a Democratic Society ("SDS").³²⁰ The dissenters viewed *CLS* as essentially identical to *Healy* and saw the Court's refusal to apply *Healy*'s protection to *CLS* as simply distaste for the group's beliefs.³²¹ Conversely, the Court asserted that *Healy*'s ban on restricting groups' First Amendment activities because of their "abhorrent" views was not violated by the law school's "paradigmatically viewpoint neutral" policy.³²² Finally, the majority and dissent gave antithetical assessments of whether the restriction on *CLS*'s right of association advanced Hastings' interest in preserving the RSO program as a limited public forum. The Court's inquiry, conducted in light of its educational context,³²³ accepted several justifications offered by the school for its all-comers requirement, including "ensur[ing] that the leadership, educational, and social opportunities afforded by [RSOs] are available to all students"³²⁴ and encouraging "tolerance, cooperation, and learning" by bringing together students of "diverse backgrounds and beliefs."³²⁵ According to the dissent, however, such rationales confused ends with means. The RSO forum fostered various opportunities by allowing students to form groups in a manner of their choosing,³²⁶ by the same token, the benign values espoused by Hastings could be constitutionally promoted by pluralistic respect for each group's right to confine membership to those who share its convictions.³²⁷

consideration of *CLS*'s argument that Hastings had engaged in discriminatory application of its all-comers policy. *CLS*, 130 S. Ct. at 2995 (majority opinion).

319. 408 U.S. 169 (1972).

320. *Id.* at 189 (finding that the university failed to demonstrate the chapter posed a threat of "material disruption").

321. *See CLS*, 130 S. Ct. at 3007-09 (Alito, J., dissenting).

322. *Id.* at 2987 & n.15 (majority opinion) (quoting *Healy*, 408 U.S. at 187-88).

323. *Id.* at 2988.

324. *Id.* at 2989 (citation omitted).

325. *Id.* at 2990 (citation omitted).

326. *Id.* at 3014-15 (Alito, J., dissenting).

327. *Id.* at 3014-16. For the argument that Hastings' action violated the doctrine of unconstitutional conditions, see Richard A. Epstein, *Church and*

II. THE ILLUSORY IDEAL OF A UNITARY THEORY OF COMPELLED SPEECH

The breadth of cases reviewed in Part I points to the futility of uniting these disparate circumstances in a discrete doctrine of negative speech rights. Neither the Court nor scholars have agreed on an explanatory principle beyond an abstract level of generality. Unsurprisingly, the pursuit of such a principle has engendered tensions and inconsistencies in the Court's jurisprudence. Commentators have proposed various standards to govern these cases, but a definitive framework remains elusive.

A. *The Indefinite Basis of Negative Speech Rights*

The fallacy of ascribing a single aim to negative speech rights is suggested by the absence of this approach in the realm of affirmative expression.³²⁸ Instead, the First Amendment's protection against restraints on speech is widely thought to derive from three variously complementary, overlapping, and colliding purposes.³²⁹ First is the search for truth through preservation of a free marketplace of ideas.³³⁰ A second theory posits that the First

State at the Crossroads: Christian Legal Soc'y v. Martinez, 2010 CATO SUP. CT. REV. 105, 121-23, 131.

328. See WILLIAM W. VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT 68 (1984) ("Deriving a consistent theory of the First Amendment from the myriad opinions of the Supreme Court represents a task similar to defining the inside and outside of a Möbius strip; that which appears logical at one point evaporates from another perspective." (quoting W. Parker (unpublished paper, Duke Law School))).

329. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 785-87 (2d ed. 1988).

330. The metaphor, of course, was coined by Justice Holmes. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . ."). John Stuart Mill is generally associated with the idea that tolerating even erroneous opinions advances the pursuit of truth. See JOHN STUART MILL, ON LIBERTY 14-15 (R.B. McCallum ed., Basil Blackwell 1947) (1859); see also LEE C. BOLLINGER, THE TOLERANT SOCIETY 45 (1986) ("[T]he dominant value associated with [free] speech is its role in getting at the truth . . ."); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970) ("An individual who seeks knowledge and truth must hear all sides of the question . . .").

Amendment is concerned foremost with promoting the robust debate on public issues essential to democratic self-government.³³¹ Under a third conception, free speech serves intrinsic rather than instrumental values, enabling individual self-fulfillment and self-determination.³³² These themes have informed the Court's consideration of negative speech rights as well.³³³ Just as broad principles have

331. See *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269-70, 273 (1964) (indicating that this purpose is the "central meaning" of First Amendment); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 24-27 (1948) ("The welfare of the community requires that those who decide issues shall understand them. . . . That is why freedom of discussion . . . may not be abridged.").

332. See C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978) (describing the "liberty model" of the free speech guarantee); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963).

333. See, e.g., *Turner II*, 520 U.S. 180, 192 (1997) ("[I]t has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." (internal quotations and citations omitted)); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 8 (1985) (Powell, J., plurality opinion) ("By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information."); *id.* at 14 (Powell, J., plurality opinion) (observing the value of controversy and "vigorous debate" under First Amendment); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977) ("[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."); *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) ("The First Amendment protects the right of individuals to hold a point of view different from the majority . . ."); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 248 (1973) ("[A]t the time the First Amendment to the Constitution was ratified . . . [a] true marketplace of ideas existed . . ."); *id.* at 258 ("[T]reatment of public issues and public officials—whether fair or unfair—constitute[s] the [protected] exercise of editorial control and judgment."); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 392 n.18 (1969) ("He must be able to hear [the arguments of adversaries] from persons who actually believe them; who defend them in earnest, and do their very utmost for them." (quoting MILL, *supra* note 323, at 32)); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943) (recognizing "a right of self-determination in matters that touch individual opinion and personal attitude"); *id.* at 636-37 (describing enforcement of the Bill of Rights as "a means of strength to individual freedom of mind in preference to officially disciplined uniformity").

crystallized into separate doctrines of affirmative speech, however, rights of resistance to government-compelled speech should not be treated as an undifferentiated whole. The multiple foundations of negative speech rights are suggested by *Barnette* itself, which has been assigned a number of meanings.³³⁴ In referring to “individual freedom of mind,”³³⁵ “individual opinion and personal attitude,”³³⁶ and similar concepts, the opinion indicates the First Amendment’s solicitude for individual freedom of thought and conscience.³³⁷ A mandatory flag salute interferes with that freedom by imposing a kind of cognitive dissonance between what a person says and thinks,³³⁸ and by threatening to indoctrinate citizens in a particular set of beliefs.³³⁹ In addition, this forced recitation of repugnant views—compelling an individual “to utter what is not in his mind”³⁴⁰—undermines the sincerity upon which effective dialogue depends.³⁴¹ Even where the force-fed message does

334. See Blasi & Shiffrin, *supra* note 20, at 410 (asserting that there is widespread uncertainty around the grounds upon which the Court reached its decision in *Barnette*); see also Mary Harter Mitchell, *Secularism in Public Education: The Constitutional Issues*, 67 B.U. L. REV. 603, 708 (1987) (noting “hard questions” raised by the opinion’s “most quoted rhetoric”).

335. *Barnette*, 319 U.S. at 637.

336. *Id.* at 631.

337. See Blasi & Shiffrin, *supra* note 20, at 433-34; Harpaz, *supra* note 42, at 902 (referring to the opinion’s concern with “first amendment interest in intellectual individualism”); Nadine Strossen, “Secular Humanism” and “Scientific Creationism”: *Proposed Standards for Reviewing Curricular Decisions Affecting Students’ Religious Freedom*, 47 OHIO ST. L.J. 333, 367 (1986).

338. See Blasi & Shiffrin, *supra* note 20, at 438; Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. U. L. REV. 1083, 1114 (1999).

339. See Lisa Shaw Roy, *Inculcation, Bias, and Viewpoint Discrimination in Public Schools*, 32 PEPP. L. REV. 647, 655 (2005); Nomi Maya Stolzenberg, “He Drew a Circle that Shut Me Out”: *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581, 605-07 (1993).

340. *Barnette*, 319 U.S. at 634.

341. See Blasi & Shiffrin, *supra* note 20, at 435-36; see also Michael K. Steenson, *Pledging Allegiance*, 29 WM. MITCHELL L. REV. 747, 765 (2003) (stating that compulsory flag salute deprives individuals of right to “speak their minds” by forcing them “to make a statement with which they disagree”). *But*

not conflict with the views of the involuntary speaker, *Barnette* can be seen as encompassing the right not to engage in public declarations of ideological positions.³⁴² Nor are the interests implicated by *Barnette* necessarily confined to the domain of the First Amendment; government compulsion to speak may violate rights of autonomy under substantive liberty as well.³⁴³ Finally, *Barnette* can also be understood as safeguarding the integrity of democratic self-government by forbidding the state to impose its orthodoxy on dissenting citizens.³⁴⁴

With *Barnette*'s lone holding subject to such varied construction, it is not surprising that the larger body of cases touching negative speech rights has resisted coherent exposition.³⁴⁵ The heterogeneity of these cases is suggested by the distance of some from *Barnette*'s affirmation of "the right to differ as to things that touch the heart of the existing order."³⁴⁶ The place of compelled subsidization of commercial messages in this jurisprudence, in particular, has repeatedly been called into question.³⁴⁷ Even matters

see Alexander, *supra* note 15, at 161 ("[T]hat people who are coerced to say things they do not believe are harmed by saying those things . . . remains undemonstrated . . .").

342. See *TRIBE*, *supra* note 329, at 1315 (observing that *Barnette*'s principle protects against compulsion to express beliefs, "whether actually held or only vacantly mouthed").

343. See Greene, *supra* note 16, at 480-82.

344. See Alan K. Chen, *Forced Patriot Acts*, 81 *DENV. U. L. REV.* 703, 707-08 (2004); Martin Guggenheim, *Stealth Indoctrination: Forced Speech in the Classroom*, 2004 *U. CHI. LEGAL F.* 57, 68-69.

345. Jacobs, *supra* note 15, at 125 (describing the Court's decisions on compelled speech claims as "a patchwork of cases with no clear thread that ties them together"); Elad Peled, *Constitutionalizing Mandatory Retraction in Defamation Law*, 30 *HASTINGS COMM. & ENT. L.J.* 33, 68 (2007) (denying that "all kinds of compelled speech should be treated alike"); Sullivan & Post, *supra* note 161, at 374 (statement of Post) (criticizing the Court for the "mess" resulting from its attempt to "fashion a one-size-fits-all doctrine" for compelled speech).

346. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

347. See, e.g., Gregory Klass, *The Very Idea of a First Amendment Right against Compelled Subsidization*, 38 *U.C. DAVIS L. REV.* 1087, 1109-26 (2005); Robert Post, *Compelled Subsidization of Speech: Johannis v. Livestock Marketing Association*, 2005 *SUP. CT. REV.* 195, 217 ("[T]he mere fact that individuals have been compelled to subsidize speech with which they disagree is not sufficient to justify constitutional scrutiny.").

thought closer to *Barnette*'s core concerns, however, have eluded clarity of principle. In resolving issues of expressive association, for example, the Court has been faulted for failure to adequately define its scope.³⁴⁸

Thus, resolution of negative speech issues has been marked not by uniformity of principle, but rather by overlapping and interweaving themes whose importance ebbs and flows in different contexts. Among the most prominent of these is the concept of "individual freedom of mind" in *Barnette* that was invoked by the Court in *Tornillo*,³⁴⁹ *Wooley*,³⁵⁰ and *Riley*.³⁵¹ The idea has intuitive appeal; government dictation of the content of one's expression interferes with citizens' ability to independently formulate their thoughts.³⁵² On the other hand, this principle does not comprehensively account for all invalidations of government compulsion that violate negative speech rights. It seems unrealistic that the inclusion of the GLIB contingent in *Hurley*, payment for mushroom advertisements in *United Foods*, or admission of Dale to the Boy Scouts would have appreciably impaired the deliberative processes of those who challenged these requirements.³⁵³ Still, even where state compulsion to speak does not detract from cognitive capacity, it may still infringe on constitutionally recognized dignitary interests. Requirements to display the government's chosen slogan or to support an unpalatable political cause, for example, can

348. See, e.g., Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483, 1497-98 (2001); Paul M. Secunda, *The Solomon Amendment, Expressive Associations, and Public Employment*, 54 UCLA L. REV. 1767, 1785 (2007).

349. See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257 (1974).

350. See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

351. See *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988).

352. See Blasi & Shiffrin, *supra* note 20, at 432.

353. See Sacharoff, *supra* note 40, at 361 ("[A] focus on . . . the speaker's freedom of mind[] actually hampers any justification for the compelled speech doctrine."); see also FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL INQUIRY* 56 (1982) ("The argument [for free speech] from self-fulfillment suffers from a failure to distinguish intellectual self-fulfillment from other wants and needs.").

be seen as violating rights of conscience.³⁵⁴ Involuntary expression of others' beliefs can also dilute or distort the projection of one's own views.³⁵⁵ Further, acquiescence in government directives to voice the messages of others may result in a diminished sense of self³⁵⁶ that is incompatible with assumptions about the role of citizens in our constitutional system.³⁵⁷

Another principle, liberty from "ventriloquism"—i.e., being branded with an unwanted view³⁵⁸—resembles freedom of thought as a powerful but scattered influence in negative speech rights.³⁵⁹ One ground for invalidating the order to include TURN's newsletter in PG&E's billing statement in *Pacific Gas*, for example, was that customers might mistakenly attribute the association's views to

354. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977) ("[A]t the heart of the First Amendment is the notion that . . . one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."); see also Kelly Sarabyn, *Prescribing Orthodoxy*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 367, 410 (2010) (discerning in *Wooley* and *Abood* the principle that "personally and directly spreading" an ideology against one's will constitutes "an offense to the privacy of the conscience").

355. Redish & Kaludis, *supra* note 338, at 1115 ("[T]here would exist a serious risk that the impact of the speaker's utterance of her own views would be diluted as a result of . . . having to mouth a position which the speaker finds abhorrent.").

356. See Gaebler, *supra* note 5, at 1006 (stating that an individual's compliance with this type of requirement causes "feelings of shame and disgrace resulting from his inability or unwillingness to defy the state on a matter of principle"); Leslie Gielow Jacobs, *The Link Between Student Activity Fees and Campaign Finance Regulations*, 33 IND. L. REV. 435, 453 (2000); Redish & Kaludis, *supra* note 338, at 1115 (referring to "publicly degrading experience" of having to voice objectionable position).

357. See *Cohen v. California*, 403 U.S. 15, 24 (1971), which notes "the premise of individual dignity and choice upon which our political system rests."

358. See Anna M. Taruschio, Note, *The First Amendment, the Right Not to Speak and the Problem of Government Access Statutes*, 27 FORDHAM URB. L.J. 1001, 1019 (2000).

359. See Wasserman, *supra* note 15, at 191 (stating that government-compelled expression "interferes with an individual's ability to define the persona she presents to the world"). But see Greene, *supra* note 16, at 474, for an assertion that compelled speech is not expressive if reasonable observer "know[s] that the speech act was compelled" and that therefore "the uttered words are not necessarily reflective of the speaker's thoughts."

PG&E.³⁶⁰ The *Hurley* Court, though declining to rule squarely on the question of misattribution, indicated that GLIB's banner would be "perceived by spectators as part of the whole" parade's expression.³⁶¹ Conversely, Court rulings rejecting asserted violations of negative speech rights have often disparaged the danger of misattribution. In the Court's eyes, neither the programming that cable broadcasters were required to transmit³⁶² nor the petition whose sponsors PruneYard was forced to admit³⁶³ would be perceived as carrying the imprimatur of the plaintiff. In other instances, however, questions of attribution appear to have played no role in the Court's decision. Realistically, for example, the Maynards' exemption from displaying "Live Free or Die" on their car was not rooted in concern that others would perceive the couple as affirmatively endorsing the motto.³⁶⁴ Indeed, the fatal defect of New Hampshire's requirement in *Wooley* was its requirement that the couple's car serve as a "mobile billboard" for the state's message.³⁶⁵

Some rationales for protecting negative speech rights suffer not from incompleteness, but rather from an opposite problem; they are general enough to encompass a spectrum of scenarios without supplying definite guidance. The *Hurley* Court, for example, stated that upholding the Veteran Council's exclusion of GLIB vindicated speakers' right to autonomy over their messages.³⁶⁶ Though autonomy makes for an appealing explanatory principle in such

360. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 15 (1986) (Powell, J., plurality opinion).

361. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 577 (1995); *see also* Friesen, *supra* note 185, at 632 (stating that inherently public nature of political advocacy increases relative danger that union's political expenditures in *Abood* would be associated with views of individual members).

362. *See Turner I*, 512 U.S. 622, 655 (1994).

363. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980); *see also* *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 471 (1997) (noting that the generic advertisement that plaintiffs opposed subsidizing was not attributed to them).

364. *See* Bezanson, *supra* note 44, at 1021-22; Madigan, *supra* note 53, at 113 ("[I]f everyone's car says the same thing, it is unlikely other people will see the motto as a product of choice or affirmation.").

365. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

366. *See Hurley*, 515 U.S. at 573, 576.

cases,³⁶⁷ it can also border on the tautological. After all, any ruling that sustains freedom from state compulsion to speak or support unwanted messages can be said to effectuate respect for autonomy.³⁶⁸ Similarly, the extent to which compelled expression distorts the marketplace of ideas³⁶⁹ is a gauge of broad relevance but limited utility. It is a reasonable observation that the First Amendment “prohibits the government from securing free advertising [of preferred messages] through compulsion for the same reason it prohibits the government from suppressing speech: the government may not favor one message over another in a way that disturbs the natural competition in the marketplace of ideas.”³⁷⁰ In particular, that marketplace is skewed by compulsion whose effect is to artificially magnify the degree of support that the government’s message apparently enjoys.³⁷¹ At the same time, however, the impact on the ideological market of particular compulsions to voice or support ideas does not seem to present a concrete or distinctive means of assessing their validity.

Still other theories may offer significant contributions to negative speech doctrine but have not been embraced by the Court. One recent commentator has advanced the thesis that the scope of negative speech rights can be best understood through the perspective and interests of

367. See, e.g., Seana Valentine Shffrin, Essay, *What is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 840 (2005) (“[T]he fundamental wrong of compelled speech . . . has more to do with the illicit influence compelled speech may have on the character and autonomous thinking process of the compelled speaker”); Taruschio, *supra* note 358, at 1017 (characterizing the *Pacific Gas* holding as “based on autonomy principles”).

368. See, e.g., Post, *supra* note 347, at 216-17 (asserting that the ubiquity of interest in autonomy renders it not useful as an explanatory principle in compelled subsidization cases).

369. See Jacobs, *supra* note 15, at 183 (“[C]ompelled expression analysis should look to whether the government’s purpose is to manipulate the marketplace of ideas or whether its purpose is not related to expression.”).

370. Sacharoff, *supra* note 40, at 399 n.352.

371. See Sarabyn, *supra* note 354, at 410; see also Shffrin, *supra* note 367, at 862 (stating that forcing people to express ideas that they do not believe undermines the search for truth by “encourag[ing] cynicism and ambivalence about the value of truth”).

listeners.³⁷² Another scholar has interpreted decisions like *PruneYard* and *Pacific Gas* as implementing the principle of “representation-reinforcement.”³⁷³ Both ideas could plausibly explain a decision like *Abood*, in which the Court forbade the union to exert exaggerated influence on the political system by inflating listeners’ perception of its positions’ popularity among members.³⁷⁴ Nevertheless, the Court’s opinion was anchored in the right of objecting members to exercise their “freedom of belief.”³⁷⁵

B. *The Mutability of Negative Speech Doctrines*

However unrealistic it is to expect a body of judicial decisions to cohere with perfect logic, negative speech rights have followed an unusually unsteady trajectory. Doctrinal tensions arise in treatment of principles that transcend specific areas as well as within those areas themselves. This pervasive dissonance further suggests that compelled expression appears in too many manifestations to be usefully guided by a single conceptual framework.

A recurring example of uncertain standards is the question of attribution. As discussed earlier, the Court has not consistently treated the weight assigned to whether compelled expression can be ascribed to the objector.³⁷⁶ Moreover, even assuming that the claimant’s association with the disputed message is a requisite element of successful claims, the Court’s decisions have varied in evaluating the asserted connection. Contrasting approaches can be discerned in the perspective from which this determination is made, the capacity for disavowal of the message, and the significance of the objector’s ideological views.

372. See Sacharoff, *supra* note 40, at 384-85.

373. David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1745 (1991) (describing this principle as “perfecting the processes of democratic accountability” (citing JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 105-16 (1980))).

374. See Sacharoff, *supra* note 40, at 334 (“The real harm in *Abood* lay with listeners and the political system because the compelled subsidies permitted the union message to become unfairly amplified.”).

375. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977).

376. See *supra* notes 358-65 and accompanying text.

As a threshold matter, the Court has not adhered to a single benchmark for examining the strength of the challenger's claim of being linked to the disputed message. When finding that the government has not violated negative speech rights, the Court has naturally tended to apply an objective standard of reasonableness. *PruneYard* furnishes a notable instance of this mode of analysis. In determining that "[t]he views expressed by members of the public . . . will not likely be identified with those of the owner,"³⁷⁷ the Court relied principally on the shopping center's character as a business establishment indiscriminately open to the public.³⁷⁸ In *FAIR* as well, the Court measured the possibility of attribution by considering visible circumstances instead of the plaintiffs' subjective feelings. According to the Court, a reasonable observer would not perceive the presence of military recruiters on campus as expressing a law school's approval of military policy on homosexuality.³⁷⁹ Likewise, the decisions sustaining subsidies for generic advertising were marked by brisk assessments of whether dispassionate viewers would tie the plaintiffs to the disputed messages. *Glickman* noted conclusively that the advertising in question was "attributed not to them, but to the California Tree Fruit Agreement or 'California Summer Fruits,'"³⁸⁰ while *Johanns* ruled that the tagline "Beef. It's What's for Dinner" was not "sufficiently specific to convince a reasonable factfinder that any particular beef producer, or all beef producers, would be tarred with the content of the trademarked ad."³⁸¹

377. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980).

378. *See id.*

379. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 65 (2006); see also Carpenter, *supra* note 72, at 241, which criticizes the holding but agrees that "[n]o knowledgeable observer will think law schools endorse anti-gay discrimination simply because they must permit military recruiters on campus or even include announcements of their presence in emails and other notices."

380. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 471 (1997).

381. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 566 (2005); see also Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1433 (2001) ("The real question . . . should be whether the government places a person in such a relationship with objectionable ideas that a reasonable observer will see the ideas as *that person's own*."); Gaebler, *supra* note 5, at 1010 ("Unless the government requires an individual to do something which reasonably identifies him with a message it is

Admittedly, objective analysis of attribution can also result in finding violation of negative speech rights;³⁸² such rulings, however, more typically spring from a probe of the claimant's distinctive sentiments rather than the vantage point of a hypothetical average person. If attribution figured at all in *Wooley*, for example, it can only be because the Court credited the Maynards' sense that they were effectively affirming the motto "Live Free or Die."³⁸³ As Justice Rehnquist argued in dissent, the state had not forced the couple to "communicate ideas with nonverbal actions reasonably likened to 'speech,' such as wearing a lapel button promoting a political candidate or waving a flag as a symbolic gesture."³⁸⁴ Similarly, though the mandatory pledge in *Barnette* obviously did qualify as speech, there was "scant risk" that a participant in such a ceremony would be "understood or misunderstood as communicating her personal patriotism or her authentic pledge of allegiance."³⁸⁵ Neither would anyone reasonably "confuse the politician's right-of-reply op-ed with a newspaper's own viewpoint" in *Tornillo*.³⁸⁶

By contrast, two other decisions in favor of claimants, *Abood* and *Dale*, present more ambiguous scenarios; nevertheless, any role of attribution in these cases contains strains of subjectivity. The *Abood* Court couched its invalidation of compulsory dues for unions' political activities in terms of conscience, not objecting members' public identification with these causes.³⁸⁷ At the same time,

difficult to describe the government's action as compelling expression."). *But see* Robert D. Kamenshine, *Reflections on Coerced Expression*, 34 LAND & WATER L. REV. 101, 116 (1999) ("[C]ompelled subsidization is objectionable even if there is no identification between the contributor and the subsidized expression.").

382. *Hurley's* treatment of the impact of GLIB's banner on the St. Patrick's Day parade might be cited as an example of such an outcome. The Court pronounced it "clear," without elaboration, that "the parade's overall message" was distilled by spectators "from the individual presentations along the way." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 577 (1995).

383. *See supra* notes 39-41 and accompanying text.

384. *Wooley v. Maynard*, 430 U.S. 705, 720 (Rehnquist, J., dissenting).

385. Blasi & Shiffrin, *supra* note 20, at 433.

386. *Carpenter*, *supra* note 72, at 241.

387. *See supra* notes 182-85 and accompanying text.

however, impingement on dissidents' conscience can be seen as rooted in their felt sense of projecting support for views that they find repugnant.³⁸⁸ The intensity of opposition that would prompt them to shelter this portion of their dues³⁸⁹ further suggests the subjective character of objectors' association with the union's activities. As for *Dale*, the Court explicitly endorsed the Boy Scouts' position that acceptance of Dale would mean aligning the organization with a specific stance on a public controversy. Dale's presence "would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."³⁹⁰ While the Court considered objective evidence, in particular the Scouts' mission statement,³⁹¹ that evidence did not point ineluctably to the conclusion that Dale's participation would convey a specific message.³⁹² Since that proposition is at least debatable, the result reflects the substantial weight accorded to the Boy Scouts' subjective perception of what Dale's inclusion would signify.³⁹³ The *Dale* Court's stance on this point is also of a piece with its broader attitude toward deference in that case.³⁹⁴

Closely related to attribution is the question of disavowal; disclaimer of a message might mitigate an otherwise illegitimate imposition of unwanted speech.³⁹⁵ Yet here too the Court has displayed no readily ascertainable general approach toward the significance of this factor. In some instances, the Court has cited ease of disassociation as partial grounds for rejecting a claimed violation of negative speech rights. Thus, the *PruneYard* Court was satisfied that

388. See Friesen, *supra* note 185, at 632.

389. See *supra* note 187 and accompanying text.

390. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000).

391. See *supra* notes 294-301 and accompanying text.

392. See *supra* text accompanying notes 302-03.

393. See Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 46 (2009).

394. See *supra* notes 309-10 and accompanying text.

395. See Gaebler, *supra* note 5, at 1003 ("Compulsion to express a particular view does not by itself preclude the opportunity to disavowal whatever one has been compelled to express.").

the shopping center's owners could "expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand."³⁹⁶ The signs could pointedly "disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law."³⁹⁷ In *FAIR*, the Court found law schools disturbed by any message sent by the presence of military recruiters to be similarly equipped to distance themselves from these implications, noting the robust means at the schools' disposal for voicing their disapproval of the military's message.³⁹⁸ When upholding rights of negative speech, however, the Court has seemingly disregarded challengers' ability to disavow the forced message. New Hampshire law did not forbid the Maynards to display a bumper sticker declaring "in no uncertain terms" their emphatic disagreement with the sentiments associated with the motto "Live Free or Die."³⁹⁹ In *Pacific Gas* as well, it is difficult to envision obstacles to PG&E's spelling out—if it were not already self-evident—that TURN did not speak for the utility. Even *Dale* may supply a somewhat ironic example of this analytical gap. Aside from general references in the Scouts' mission statement to its members' staying "morally straight" and "clean,"⁴⁰⁰ the Court cited only scattered evidence of the Scouts' opposition to homosexuality.⁴⁰¹ Forced acceptance of Dale under New Jersey's law might have given the Scouts motivation and occasion to trade this relative reticence for a full-throated proclamation of its view.

That the *Dale* Court did not weigh the feasibility of a disclaimer points to another ambiguity in the Court's disposition of negative speech claims. Consideration of opportunities to disavow unwanted expression in *PruneYard* and *FAIR* implies a relatively narrow scope of negative speech rights: viz., protection against conveying a

396. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980).

397. *Id.*

398. See *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47, 60, 65, 69-70 (2006).

399. *Wooley v. Maynard*, 430 U.S. 705, 722 (Rehnquist, J., dissenting).

400. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 649-50 (2000); see *supra* note 302 and accompanying text.

401. See *Dale*, 530 U.S. at 651-52.

particular objectionable message.⁴⁰² As Justice Powell observed in *PruneYard*, however, the need for disavowal to negate the impression of endorsement causes a different type of compulsion. In such an instance, the property owner "has been forced to speak when he would prefer to remain silent The mere fact that he is free to disassociate himself from the views expressed on his property . . . cannot restore his 'right to refrain from speaking at all.'"⁴⁰³ In quoting from *Wooley's* broad protection of a right not to speak, Justice Powell invoked the more expansive terms in which the Court has sometimes conceived the interest at stake in such cases. It was this conception that appeared to inform the Court's reasoning in *Dale*. If the Scouts wished, stated the Court, it was entitled to instruct Scout leaders to "avoid questions of sexuality" altogether, imparting its views on the subject "only by example."⁴⁰⁴ Thus, the Court in some cases has seemed to recognize a sweeping right to remain silent on a topic, while in others condoning a practical impetus to speak.

A larger institutional question linked to attribution is the comparative deference extended to competing state and private claims.⁴⁰⁵ The problem comes into heightened focus in the arena of expressive association, when government efforts to bar discriminatory access are met by claims that admission of an excluded class of person or activity will

402. *Glickman* can also be understood as proceeding on this premise. While the Court found that the advertising of California fruits was not ascribed to the plaintiffs, *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 471 (1997), it also indicated that such attribution would not have affected the outcome. In stressing that "none of the generic advertising conveys any message with which respondents disagree," *id.*, the Court appeared to confine the relevant right to avoiding expression of a distasteful view. Under this analysis, the plaintiffs lacked a constitutionally cognizable right not to issue any pronouncements on the topic. *Id.* at 472.

403. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 99 (Powell, J. concurring) (quoting *Wooley*, 430 U.S. at 714); see also Taruschio, *supra* note 358, at 1043 ("[T]he pressure to respond is a significant intrusion on the right not to speak; it forces someone to speak when they would rather remain silent or run the risk of agreeing with the offending speech.").

404. *Dale*, 530 U.S. at 655.

405. See generally Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1117-39 (2008) (discussing the conflict between deference to Congress and deference to law schools in *FAIR*).

alter a group's message.⁴⁰⁶ Resolution of such clashes often hinges on the deference accorded to the group's assertion of the expressive impact of inclusion, or to the government's contention that its measure is necessary to achieve a weighty purpose. In this area as well, the Court has not unswervingly followed a clearly articulated course.

Ironically, the Court's most definite pronouncement on deference states principles to which the Court has not generally adhered. As noted earlier, *Dale* proclaimed a doctrine of deference to both an association's assertion of the substance of its message and its view of conditions for preserving that expression.⁴⁰⁷ Such deference, however, especially on the question of what would undermine existing values, is hardly evident in other major decisions. The *Roberts* Court dismissed out of hand the Jaycees' position that admission of women was likely to affect the organization's mission of promoting the interests and development of young men.⁴⁰⁸ Likewise, the Court rejected the notion—even if bolstered by statistical support—that different outlooks between men and women generally could prompt changes in the Jaycees' positions on public issues.⁴⁰⁹ In *CLS*, the Court not only declined an arguably natural application of *Dale's* deference,⁴¹⁰ but also opined that CLS's

406. For a suggestion that an intermediate level of deference may be appropriate in this context, see Note, *Leaving Religious Students Speechless: Public University Antidiscrimination Policies and Religious Student Organizations*, 118 HARV. L. REV. 2882, 2887 (2005) (noting that unlimited deference could enable wholesale exemption from antidiscrimination policies, but that absence of deference could force groups that "genuinely desire to associate to express disfavored ideas" to admit nonadherents).

407. See *supra* notes 304-07 and accompanying text; see also Chemerinsky, *supra* note 78, at 275 ("[T]he Court in *Boy Scouts of America v. Dale* essentially held that a group could define its own expressive message during litigation.").

408. *Roberts v. United States Jaycees*, 468 U.S. 609, 627 (1984) ("There is . . . no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views."). In contrast, the Court of Appeals had thought it "natural to expect that an association containing both men and women will not be so single-minded about advancing men's interests as an association of men only." *U.S. Jaycees v. McClure*, 709 F.2d 1560, 1571 (8th Cir. 1983).

409. *Roberts*, 468 U.S. at 627-28.

410. See Christian A. Malanga, Note, *Expressive Association—Student Organizations' Right to Discriminate: A Look at Public Law Schools'*

fear of being overwhelmed by members not sharing its values “strikes us as more hypothetical than real.”⁴¹¹ Perhaps most vividly, *FAIR*’s skepticism toward law schools’ resistance to military recruiters⁴¹² displayed scant deference to “an association’s view of what would impair its expression.”⁴¹³

Conversely, *Roberts*, *FAIR*, and *CLS* exhibit deference toward the government’s view on the importance of its measure—a deference that is conspicuously absent from *Dale*. Even applying strict scrutiny, the *Roberts* Court accepted Minnesota’s judgment that its interest in halting discrimination justified major intrusion into the Jaycees’ associational freedom.⁴¹⁴ In *FAIR*, the Court deferred to the military and Congress on what it regarded as essentially a matter of military policy.⁴¹⁵ Unlike *Roberts* and *FAIR*, *CLS* did not involve a legislative determination to which the Court might defer, and the Court recited the truism that “we owe no deference to universities when we consider” whether a university has transgressed constitutional limitations.⁴¹⁶ Nevertheless, the Court took pains to voice humility in reviewing Hastings’ all-comers policy, noting that judges “lack the on-the-ground expertise and experience of school administrators.”⁴¹⁷ Ultimately, the

Nondiscrimination Policies and Their Application to Christian Legal Society Student Chapters, 29 W. NEW ENG. L. REV. 757, 777 (2007) (stating, prior to the Court’s holding in *CLS*, that “[b]ecause the Court found that including James Dale as a member would significantly affect the Scouts’ ability to project its viewpoint, it seems logical that a court analyzing the CLS’s claim would find that including a homosexual would similarly inhibit the CLS’s ability to express its viewpoints”).

411. *Christian Legal Soc’y v. Martinez (CLS)*, 130 S. Ct. 2971, 2992 (2010).

412. See *supra* notes 73-80 and accompanying text.

413. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000); Carpenter, *supra* note 72, at 252 (“Rather than deferring to the law schools about what impairs their expression, the Court almost mocks their claims.”); Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1553 (2007) (arguing that the Court “paid lip service, at best,” to the concept of deference to expressive associations).

414. *Roberts*, 468 U.S. at 623.

415. See *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 58-59 (2006); see also Horwitz, *supra* note 406, at 1553.

416. *CLS*, 130 S. Ct. at 2988.

417. *Id.*

Court's approval of that policy proceeded from a philosophy that cautioned courts against "substitut[ing] their own notions of sound educational policy for those of the school authorities which they review."⁴¹⁸

Finally, perhaps nowhere is the Court's checkered analysis in addressing problems of negative speech rights more glaring than in the generic advertising cases. As discussed earlier, commentators have accused the Court of thoroughgoing inconsistency in its disposition of the *Glickman-United Foods-Johanns* trilogy.⁴¹⁹ Even observers who find the decisions reconcilable tend to defend their collective meaning in guarded terms.⁴²⁰ In a sense, then, the Court's inability to present a persuasive account of its reasoning in this fairly discrete field represents a microcosm of the flagging broader enterprise of negative speech rights.

III. INDICIA OF SUBORDINATION

The formal notion of a broad and co-equal right against compelled speech has obscured the fragility of negative speech rights in practice. Indeed, it is questionable whether the core right to refrain from speaking proclaimed in *Barnette* has a substantial independent existence. Rather, it

418. *Id.* (quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982)).

419. See *supra* Part I.D.3.; see also Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259, 1292 (2010) (finding beef marketing program in *Johanns* indistinguishable from mushroom program in *United Foods* "[f]rom a First Amendment perspective"); Sullivan & Post, *supra* note 161, at 370 (statement of Sullivan) ("[T]he trilogy . . . reveals the most frightening internal theoretical incoherence about why commercial speech should receive constitutional protection and about what kind of protection it should receive."). But see Jennifer L. Pomeranz, *Compelled Speech Under the Commercial Speech Doctrine: The Case of Menu Label Laws*, 12 J. HEALTH CARE L. & POL'Y 159, 179-80 (2009) (concluding that differences in outcomes in *United Foods* and *Glickman* can be explained by distinction between factual statements and assertions of belief).

420. See, e.g., Mark Champoux, Recent Case, *Uncovering Coherence in Compelled Subsidy of Speech Doctrine: Johannis v. Livestock Marketing Ass'n*, 125 S. Ct. 2055 (2005), 29 HARV. J.L. & PUB. POL'Y 1107, 1113 n.48 (2006) ("[T]he view adopted in this Comment seeks simply to illuminate the possibility of coherence, even if narrow, in the Court's jurisprudence.").

appears that negative speech rights receive robust protection primarily when tethered to another interest of constitutional character. In addition, negative speech claims have been repeatedly rejected on the ground that a separate conceptual framework supersedes the claim. Further indicating the vulnerability of negative speech rights, the Court has allowed even acknowledged infringements of these rights where the state can plausibly portray its interest as advancing other constitutional values. These patterns of subordination, intertwined with the area's lack of theoretical coherence, bode ill for assertions of negative rights against emerging forms of compelled speech.

A. *Special Protection for "Hybrid" Claims*

Successful assertions of negative speech rights have generally involved, at least tacitly, the presence of other constitutional norms. This pattern suggests that challenges to compelled speech, in isolation, have less force than comparable claims of affirmative speech rights. Rather, negative speech rights appear to draw strength largely from combination with separate constitutionally cognizable interests. The dependence on "hybrid" conditions for a right's potency has precedent in the Court's free exercise jurisprudence, where the Court tolerated a disjunction between its doctrine and outcomes before formally announcing a less protective regime. In *Employment Division v. Smith*,⁴²¹ the Court discarded the standard of strict scrutiny for free exercise claims it had announced twenty-seven years earlier⁴²² and preserved in later cases even while repeatedly rejecting such claims.⁴²³ Instead, the Court declared that it would align principle with practice by

421. 494 U.S. 872 (1990).

422. See *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) ("[A]ny incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest . . .'" (citation omitted)).

423. This line of cases included both decisions in which the government restriction was deemed to satisfy the *Sherbert* test, see, e.g., *United States v. Lee*, 455 U.S. 252, 258-60 (1982) (rejecting claim for religious exemption from participation in social security system on ground that "mandatory participation is indispensable to the fiscal vitality of the social security system"), and those in which the Court found the test inapplicable, see, e.g., *Goldman v. Weinberger*, 475 U.S. 503, 506-07 (1986) (stating that the *Sherbert* test does not apply to free exercise claim for exemption from general rule in military setting).

permitting enforcement of valid “generally applicable prohibitions of socially harmful conduct” to religiously motivated instances of that conduct.⁴²⁴ Other than in the now-particularized circumstance of *Sherbert* itself,⁴²⁵ the Court would apply the “compelling interest” test only in “hybrid situation[s]” where the Free Exercise Clause operated “in conjunction with other constitutional protections.”⁴²⁶ According to the Court, this approach explained past invalidations of regulations that impinged not only on free exercise, but also on rights like free speech or substantive due process.⁴²⁷

Admittedly, *Smith*’s requisite for applying strict scrutiny to free exercise claims furnishes an imperfect analogy to the theory of negative speech rights as reliant on additional rights for their potency. The decision has been variously criticized as disingenuous,⁴²⁸ unclear,⁴²⁹ and

424. *Smith*, 494 U.S. at 885.

425. The Court observed that the eligibility criteria of unemployment compensation programs “invite consideration of the particular circumstances behind an applicant’s unemployment.” *Id.* at 884.

426. *Id.* at 881-82.

427. *Id.* at 881. The Court cited as examples, inter alia, *Cantwell v. Connecticut*, 310 U.S. 296 (1940), which struck down a licensing scheme for religious and charitable solicitations that authorized the administrator had discretion to withhold license for nonreligious causes, and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which invalidated enforcement of compulsory school-attendance laws to Amish parents who for religious reasons refused to send their children to school beyond the eighth grade. *Smith*, 494 U.S. at 881.

428. See, e.g., William P. Marshall, Correspondence, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309 (1991) (asserting the *Smith* decision’s “use of precedent borders on fiction”); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1124 (1990) (stating that the apparent purpose of *Smith*’s discussion of hybrid cases was “to enable the Court to reach the conclusion it desired . . . without openly overruling any prior decisions”).

429. See Note, *The Best of a Bad Lot: Compromise and Hybrid Religious Exemptions*, 123 HARV. L. REV. 1494, 1498-1508 (2010) (describing the variety of approaches that lower courts have used to interpret hybrid situation doctrine); see also Bertrand Fry, Note, *Breeding Constitutional Doctrine: The Provenance and Progeny of the “Hybrid Situation” in Current Free Exercise Jurisprudence*, 71 TEX. L. REV. 833, 862 (1993) (stating that there can be “no doubt” about the “lack of coherent protection” under the hybrid doctrine).

underprotective,⁴³⁰ and the *Smith* Court did retain strict scrutiny for those unusual laws that specifically target a religious practice.⁴³¹ Still, the holding shows the Court's receptivity to allowing certain constitutional rights to offer slender protection unless bolstered by other forms of constitutional liberty. In the case of negative speech rights, this dynamic appears to operate with special force when compelled expression carries the risk of operating as a restriction of speech as well. The *Riley* Court's rejection of North Carolina's disclosure requirement for fundraisers⁴³² is especially instructive. Compared to clashes with beliefs entailed by the compulsions in *Barnette*, *Wooley*, and *Tornillo*, the mandated report of data in *Riley* represented a modest intrusion on speech prerogatives.⁴³³ The Court, however, was disturbed by the statute's potential to suppress speech: "[I]f the potential donor is unhappy with the disclosed percentage, the fundraiser will not likely be given a chance to explain the figure; the disclosure will be the last words spoken as the donor closes the door or hangs up the phone."⁴³⁴ *Tornillo* and *Pacific Gas* similarly displayed concern that state directives serving as vehicles for others' speech would dampen the plaintiffs' own expression. Noting the deterrent to treatment of controversial issues produced by Florida's right of reply statute, the *Tornillo* Court predicted that "political and electoral coverage would be blunted or reduced."⁴³⁵ Justice Powell's plurality opinion in *Pacific Gas* likewise condemned the potential chilling effect of the Commission's

430. See, e.g., John Delaney, *Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of Oregon v. Smith*, 25 IND. L. REV. 71, 102-03 (1991) (arguing that *Smith* subordinates the Free Exercise Clause to the government's interest in criminal enforcement); McConnell, *supra* note 428, at 1152-53 (arguing that *Smith* undermines the protection afforded to minority religions by the Free Exercise Clause).

431. *Smith*, 494 U.S. at 877-78; see also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

432. See *supra* notes 170-76 and accompanying text.

433. See *Wright*, *supra* note 175, at 494.

434. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988).

435. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257 (1974). See also *TRIBE*, *supra* note 329, at 1002, which characterizes the *Tornillo* Court as having recognized that "the power to compel speech comes too close to the power to censor speech."

order for PG&E to include TURN's newsletter in its billing envelope.⁴³⁶ To avoid the order's triggering mechanism,⁴³⁷ PG&E might well "avoid controversy"⁴³⁸ and "limit its own speech";⁴³⁹ as a practical matter, then, the order tended to "inhibit expression of appellant's views."⁴⁴⁰

Constraints on expression can also be discerned in other cases where the Court has sustained claims of negative speech rights. In upholding rights of expressive association, for example, the Court has determined that forcing the association to include the speech in question would impair its ability to express its view. In *Hurley*, display of GLIB's banner in the St. Patrick's Day parade would have not only foisted on the Veterans Council a message opposed by the group. It would also have "alter[ed] the message"⁴⁴¹ that the association sought to convey through this expressive activity, and thus undermined the effectiveness of the Council's own speech. For the *Dale* Court, too, the First Amendment right of exclusion was bound up with the organization's freedom from restraints on its expression. The Court described its ruling that the Boy Scouts could deny membership to Dale as "protect[ing] the First Amendment rights of those who wish to voice a different view."⁴⁴²

Some decisions can be understood as more subtly signaling heightened scrutiny of compelled expression that may stifle speech as well. In *Abood*, the expenditure of required service fees on political activities effectively diverted resources from objectors' favored causes to ones that they opposed.⁴⁴³ From this zero-sum-game perspective, mandated contributions to fund dissemination of repugnant

436. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 14 (1986) (Powell, J., plurality opinion).

437. *See id.* (noting that access was granted "only to those who disagree with appellant's views").

438. *Id.* (quoting *Tornillo*, 418 U.S. at 257).

439. *Id.* at 11 n.7.

440. *Id.* at 20.

441. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 581 (1995).

442. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000).

443. *See supra* notes 180-84 and accompanying text.

views diminish objectors' own speech. Even where objectors do not intend to allocate the challenged dues to political aims, extraction of fees to support a hostile agenda shrinks their relative voice in the political process. Additionally, in the case of commercial disclosure requirements, the Court has suggested that its tolerance for compelled information will end where a significant restraint on advertisers' speech begins. While upholding Ohio's mandatory disclosure requirement in *Zauderer*,⁴⁴⁴ the Court cautioned that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by *chilling* protected commercial speech."⁴⁴⁵ Similarly, the Court's approval of the challenged provisions in *Milavetz*⁴⁴⁶ was premised on their "impos[ing] a disclosure requirement rather than an affirmative limitation on speech."⁴⁴⁷

Nor are affirmative speech rights the only complementary constitutional interests that can be detected in cases where the Court has ruled compelled speech invalid. Though the Court has not invoked the Takings Clause⁴⁴⁸ in sustaining negative speech claims, the interest in property safeguarded by that provision has colored a number of such decisions. Both the *Wooley* and *Pacific Gas* Courts couched their reasoning in terms of the state's improper appropriation of the claimant's property. *Wooley* barred the state from "requir[ing] an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public."⁴⁴⁹ In *Pacific Gas*, the access order was deemed to require PG&E to "to use *its* property as a vehicle for spreading a message with which it disagrees."⁴⁵⁰ Moreover,

444. See *supra* notes 155-61 and accompanying text.

445. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (emphasis added).

446. See *supra* notes 3-4, 162-63 and accompanying text.

447. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1339 (2010).

448. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

449. *Wooley v. Maynard*, 430 U.S. 705, 713 (1977).

450. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 17 (1986) (Powell, J., plurality opinion); *id.* at 17-18 ("[T]he Commission's order requires appellant to use its property—the billing envelopes—to distribute the message of

Abood—and by extension *Keller* and even *United Foods*—embodies a rejection of government's deprivation of property usually associated with takings jurisprudence.⁴⁵¹ In a sense, *Abood's* distinction between permissible and forbidden mandatory dues mirrors the line drawn in takings doctrine. Compulsory fees for "germane" activities are repaid through the benefits of collective bargaining, much like the advantages that those subjected to restrictions on using their property receive from the overall regulatory scheme.⁴⁵² Conversely, forced subsidization of disagreeable views resembles restrictions that deplete one's property without compensation or offsetting benefits.⁴⁵³ Finally (if more speculatively), even the Court's resolution of expressive association claims can be viewed as entailing considerations of property. Richard Epstein has argued that associational rights derive not only from free speech, but also from "liberty and property as ordinarily conceived."⁴⁵⁴ Accordingly, antidiscrimination laws should overcome exclusionary preferences "only in those cases where claims for freedom of association are asserted by firms or institutions that occupy some monopoly position."⁴⁵⁵ From this perspective, one might distinguish *Dale* from *Roberts* on the basis of the Jaycees' quasi-monopolistic position as a forum for business networking.⁴⁵⁶

another."); see Yassky, *supra* note 373, at 1739 ("[T]he PG&E interest vindicated by the *Pacific Gas* Court seems remarkably similar to a property right.").

451. See *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980); see also *infra* note 448 and accompanying text.

452. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 (1987) ("While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others."); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (referring to "an average reciprocity of advantage").

453. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (finding compensable taking where a state required the owner of an apartment building to allow a cable company to affix a cable to its building).

454. Epstein, *supra* note 310, at 120.

455. *Id.* at 121.

456. See William Buss, *Discrimination by Private Clubs*, 67 WASH. U. L.Q. 815, 850 (1989) ("[In connection with *Roberts*, the] most well established ground for denying an association the right to select its members is the elimination of the economic harm that results from excluding disfavored groups."); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 46

Another constitutional norm that may infuse negative speech rights with requisite vitality is freedom of the press. While the Court has denied that the Free Press Clause⁴⁵⁷ confers distinctive rights on the institutional media,⁴⁵⁸ it has indicated special solicitude for the function that they traditionally perform.⁴⁵⁹ Here the analogy to free exercise hybrid rights seems especially apt. The Court in *Smith* described the result in *Wisconsin v. Yoder*,⁴⁶⁰ upholding Amish parents' refusal to send their children to school beyond the eighth grade, as not resting on the Free Exercise Clause alone; rather, the Yoders' rights also derived from the liberty of parents to direct the education of their children recognized in *Pierce v. Society of Sisters*.⁴⁶¹ At the same time, the *Yoder* opinion by its own terms did not apply to similar claims based on "secular values" instead of a "religious basis."⁴⁶² Thus, the notion of hybrid rights represented by *Yoder* can be seen as operating synergistically, with two constitutional values forging a privilege that neither alone could support. Similarly, even though the Free Press Clause lacks separate enforceability, its values may add decisive weight to some negative speech claims. Thus, the Court highlighted the "intrusion into the function of editors" effected by the right of reply statute in

(2000) ("[B]ecause Jaycees was essentially a business networking organization, the state may [have had] a stronger than usual interest in regulating the Jaycees in order to ensure equal access to economic opportunity.").

457. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom . . . of the press . . .").

458. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 782 (1978) ("[T]he press does not have a monopoly on either the First Amendment or the ability to enlighten."); *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (rejecting greater access to prisons or inmates than the general public); see also *Branzburg v. Hayes*, 408 U.S. 665, 705 (1972) ("The informative function [of organized press] is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists.").

459. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587-88, 587 n.3 (1980); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

460. 406 U.S. 205 (1972).

461. 268 U.S. 510 (1925); see *Emp't Div. v. Smith*, 494 U.S. 872, 881 (1990) (applying *Pierce*).

462. *Yoder*, 406 U.S. at 216.

*Tornillo*⁴⁶³ and found in *Pacific Gas* that the concerns underlying its invalidation of that statute applied to PG&E “as well as to the institutional press.”⁴⁶⁴

Ultimately, the idea that negative speech rights draw potency from hybrid conditions raises the question of whether *Barnette*—the original source of these rights, cited by the Court as an exemplar of “true ‘compelled-speech’ cases”⁴⁶⁵—can be viewed in this light. At a minimum, it can be said that the right to refrain from speaking was not the only constitutional interest discernable in the case. As in other instances noted above, the State’s compulsion to engage in expression effectively restrained speech as well. Refusal to salute the flag or pledge allegiance here represented symbolic protest,⁴⁶⁶ and state insistence on conformity amounted to suppression of that dissent.⁴⁶⁷ Realistically, moreover, the dissenting students were acting at the direction of their parents, whose values were reflected in this conduct.⁴⁶⁸ At least obliquely, then, *Barnette* incorporates tenets from a pair of cases decided two decades earlier. Declaring that “[t]he child is not the mere creature of the State,”⁴⁶⁹ the Court in *Pierce* acknowledged that the substantive liberty protected by the Fourteenth Amendment’s Due Process Clause includes the right of parents to “direct the upbringing and education of [their] children.”⁴⁷⁰ Oregon had unduly interfered with that liberty by forcing parents who wished to send their children to private schools to enroll them in public schools instead.⁴⁷¹

463. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

464. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 11 (1986) (Powell, J., plurality opinion).

465. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 557 (2005).

466. *See* Gaebler, *supra* note 5, at 998.

467. *See* Gey, *supra* note 419, at 1265-66 (“[S]ince the Pledge was originally conceived as a government assertion of uniformity and solidarity, any dissent from the Pledge would undercut the central meaning of the government’s message.” (footnote omitted)).

468. *See* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630 (1943) (noting the prosecution of parents of children who refuse to participate in flag salute ceremony “for causing delinquency”).

469. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

470. *Id.* at 534-35.

471. *Id.*

Similarly, the Court in *Meyer v. Nebraska*⁴⁷² invoked the due process right to “establish a home and bring up children”⁴⁷³ to strike down a prohibition on teaching languages other than English. Thus, *Barnette*’s holding thwarted encroachment on this type of liberty by forbidding West Virginia to “prescribe what shall be orthodox”⁴⁷⁴ in the beliefs that parents instill in their children.

B. *Compelled Speech as a Secondary Classification*

While successful negative speech claims typically present hybrid circumstances, failed claims often result from the Court’s framing the issue such that compelled speech is not the decisive perspective. In these cases, the Court has analyzed the dispute through the lens of a different category in which negative speech rights are implicated only incidentally or not at all. The susceptibility of compelled speech claims to re-characterization further underscores the relative weakness of their underlying doctrine.

Perhaps the most notable instance of this phenomenon is the Court’s dismissal of beef producers’ claim in *Johanns*.⁴⁷⁵ In ruling that the promotional campaign in question constituted government expression, the Court short-circuited the producers’ theory of compelled speech. Of course check-off programs for industry-wide advertising are not the only setting in which the Court has invoked government speech doctrine to deflect First Amendment challenges. *Johanns*’s pronouncement that “the Government’s own speech . . . is exempt from First Amendment scrutiny”⁴⁷⁶ stated a familiar principle.⁴⁷⁷ The

472. 262 U.S. 390 (1923).

473. *Id.* at 399.

474. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

475. See *supra* notes 264-80 and accompanying text.

476. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005).

477. See EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES, AND POLICY ARGUMENTS* 410 (3d ed. 2008) (“The government has largely unlimited power to control what is said in its official organs . . . or in organs that it officially endorses, even if this control is exercised in a viewpoint-based way.”); Bezanson & Buss, *supra* note 381, at 1380 (“[I]n representative democracies . . . governments’ speech must consist not just of information but also of explanation, persuasion, and justification.”). See generally Abner S.

modern version of the doctrine originated in *Rust v. Sullivan*,⁴⁷⁸ where the Court upheld federal regulations barring recipients of federal funds from providing counseling or information that could encourage abortion.⁴⁷⁹ The Court reasoned that “when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.”⁴⁸⁰ A decade later, the Court explained that “viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker . . . or instances, like *Rust*, in which the government ‘used private speakers to transmit specific information pertaining to its own program.’”⁴⁸¹ Substantial criticism of its approach notwithstanding,⁴⁸² the Court recently affirmed that government actions in support of its own policies lie outside the purview of the Free Speech Clause.⁴⁸³

Whatever the breadth of its application, however, the government speech doctrine has special potential to defeat negative speech claims against compelled subsidies.⁴⁸⁴

Greene, *Government of the Good*, 53 VAND. L. REV. 1 (2000) (arguing that government should engage in expression to promote public good).

478. 500 U.S. 173 (1991).

479. *See id.* at 179-80 (describing regulations at issue).

480. *Id.* at 194.

481. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995)).

482. *See, e.g., Gey, supra* note 419, at 1259-60 (criticizing the Court’s “increasingly expansive conception of government speech” and proposing that the Court “could eliminate the government speech doctrine entirely without harming a single one of the government’s legitimate objectives”); *see also Corbin, supra* note 276 (proposing the Court’s recognition of mixed speech as an alternative to the current dichotomy of private and governmental speech).

483. *See Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1131 (2009) (“[T]he Free Speech Clause] restricts government regulation of private speech; it does not regulate government speech.”). The Court characterized a privately donated monument to a public park as government speech and therefore immune from challenge under the Free Speech Clause. *Id.* at 1129; *see also Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (“We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes.”).

484. *See generally Note, The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, 117 HARV. L. REV. 2411 (2004)

Indeed, the implications of the doctrine were intimated even as the Court struck down mandatory assessments for mushroom advertising in *United Foods*.⁴⁸⁵ There, the Court rejected the government speech defense not because it would inevitably fail, but because the government had not raised it in a timely manner.⁴⁸⁶ Squarely presented with the argument in *Johanns*, the Court embraced a “generous and encompassing definition”⁴⁸⁷ of government speech that could shield a range of forced subsidies from First Amendment challenge. Moreover, while the Court in *Southworth* did not rest its approval of the student activity fee on the government speech doctrine,⁴⁸⁸ it has indicated there and elsewhere that even a core First Amendment tenet like the proscription of viewpoint discrimination will yield to a determination that the message is a university’s own.⁴⁸⁹ Thus, expansive notions of government speech and staunch immunity for its content augur poorly for many objectors to forced support for offending speech.

The *Southworth* opinion also incorporated another doctrine with the capacity to trump otherwise plausible assertions of negative speech rights: the idea of the public forum. The Court referred to its earlier decision in *Rosenberger v. Rector & Visitors of the University of Virginia*,⁴⁹⁰ which had characterized a university’s student activities fund as a “metaphysical” public forum governed by the same principles as physical ones.⁴⁹¹ Though *Rosenberger* had ruled and *Southworth* affirmed that funding decisions must observe viewpoint neutrality,⁴⁹² *Southworth*’s outcome demonstrates how the public forum

(proposing to modify categorical immunity for government speech by importing germaneness principle).

485. See *supra* notes 253-63 and accompanying text.

486. *United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2000).

487. Post, *supra* note 240, at 556.

488. *Bd. of Regents v. Southworth*, 529 U.S. 217, 229 (1999).

489. See *id.* at 235; *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995) (“A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University’s own speech, which is controlled by different principles.”).

490. 515 U.S. at 833.

491. *Id.* at 830.

492. *Southworth*, 529 U.S. at 233 (citing *Rosenberger*, 515 U.S. at 841).

concept can preempt negative speech claims. In effect, the university's policy of creating a forum through which students could "engage in dynamic discussions . . . outside the lecture hall"⁴⁹³ overrode the plaintiffs' interest in avoiding payment funding expression that they opposed.

A more explicit illustration of public forum doctrine's power to submerge negative speech theory appears in *CLS*. The announcement that "our limited-public-forum precedents supply the appropriate framework"⁴⁹⁴ for assessing *CLS*'s claim placed the organization in a precarious position. Those precedents had established a lenient regime for judging selective access to public property receiving this designation.⁴⁹⁵ Thus, the Court would rule only on the "*permissibility*" of Hastings' nondiscrimination policy, not its "*advisability*."⁴⁹⁶ Under this standard, the policy could be "rationally" regarded as advancing the school's aims of "development of conflict-resolution skills, toleration, and readiness to find common ground."⁴⁹⁷ Moreover, by viewing the dispute through the prism of a limited public forum, the Court transformed the nature of *CLS*'s claim; rather than resisting encroachment, the association was seeking "what is effectively a state subsidy."⁴⁹⁸

Nor have specific doctrinal devices like government speech and public forum been the only means by which the Court has diluted or diverted negative speech claims. In a number of cases, the Court has emphasized the commercial or economic aspect of the government's interest to diminish the claimant's stake in expression. *Glickman*'s approval of mandatory fees to fund advertising of summer fruits⁴⁹⁹ provides a salient example. At the outset of its analysis, the Court posed a stark dichotomy: "The legal question that we

493. *Id.*

494. *Christian Legal Soc'y v. Martinez (CLS)*, 130 S. Ct. 2971, 2985 (2010).

495. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

496. *CLS*, 130 S. Ct. at 2992.

497. *Id.* at 2990.

498. *Id.* at 2986; *see also id.* at 2978 ("The First Amendment shields *CLS* against state prohibition of the organization's expressive activity But *CLS* enjoys no constitutional right to state subvention of its selectivity.").

499. *See supra* notes 241-52 and accompanying text.

address is whether being compelled to fund this advertising raises a First Amendment issue for us to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve."⁵⁰⁰ The opinion repeatedly assumes this binary choice. Thus, the Court declined to distinguish the advertising program from other features of the marketing orders that "arguably disadvantage particular producers for the benefit of the entire market."⁵⁰¹ Understood in this light, the program did not infringe on First Amendment values; it imposed "no restraint on the freedom of any producer to communicate any message to any audience," nor did it "compel any person to engage in any actual or symbolic speech."⁵⁰² Ultimately, the Court determined that the marketing program amounted to no more than "a species of economic regulation" and therefore deserved "the same strong presumption of validity that we accord to other policy judgments made by Congress."⁵⁰³

In spurning other assertions of negative rights as well, the Court has sometimes seen the crucial dynamic as adjustment of economic forces rather than solicitude for speech. The decision in *Turner II* to sustain Congress's must-carry rules⁵⁰⁴ rests on such a premise: "Judgments about how competing economic interests are to be reconciled in the complex and fast-changing field of television are for Congress to make. Those judgments 'cannot be ignored or undervalued simply because [appellants] cas[t] [their] claims under the umbrella of the First Amendment.'"⁵⁰⁵ Proceeding on this principle, the Court declined to "infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy."⁵⁰⁶ A similar philosophy of deference to legislative regulatory prerogative informs the *Abood* line of cases.⁵⁰⁷ In sustaining

500. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 468 (1996).

501. *Id.* at 474.

502. *Id.* at 469; *id.* at 469-70 ("[The advertising program did] not compel the producers to endorse or to finance any political or ideological views.").

503. *Id.* at 477.

504. See *supra* notes 137-42 and accompanying text.

505. *Turner II*, 520 U.S. 180, 224 (1997) (quoting *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973)).

506. *Id.* at 196.

507. See *supra* notes 177-217 and accompanying text.

mandatory fees to fund activities germane to collective bargaining, the *Abood* Court weighed dissenters' ideological objections in the context of "the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress."⁵⁰⁸ Likewise, compulsory dues to an integrated bar in *Keller* were justified by "the State's interest in regulating the legal profession and improving the quality of legal services,"⁵⁰⁹ and in assuring that lawyers "pay a fair share of the cost"⁵¹⁰ of the system from which they benefit.

Even where compelled expression is unequivocally at issue, its commercial context can furnish grounds for lesser protection of negative speech rights. As discussed earlier, the Court has adopted a lenient approach toward required disclosures that plausibly promote the accuracy of information received by consumers.⁵¹¹ This latitude stands out not only for its contrast to the political sphere, where it is axiomatic that candidates could not be required to supply information assuring the truth of their promises;⁵¹² within the realm of commercial speech itself, the Court has steadily raised its scrutiny of restrictions over the course of the past several decades.⁵¹³ This two-track approach—including a broad conception of "purely factual and uncontroversial information"⁵¹⁴ that the state may insert

508. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977).

509. *Keller v. State Bar*, 496 U.S. 1, 13-14 (1990).

510. *Id.* at 12.

511. See *supra* notes 155-61 and accompanying text.

512. See Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372, 386 (1979) ("A political candidate knows the truth about his own past and his present intentions, yet misrepresentations on these subjects are immune from state regulation."). But see Stephen D. Sencer, Note, *Read My Lips: Examining the Legal Implications of Knowingly False Campaign Promises*, 90 MICH. L. REV. 428 (1991) (suggesting possibility of legal deterrence to knowingly false campaign promises).

513. Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 887 (2008); Lyrissa Barnett Lidsky & Tera Jckowski Peterson, *Medium-Specific Regulation of Attorney Advertising: A Critique*, 18 U. FLA. J.L. & PUB. POL'Y 259, 282 (2007).

514. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

into advertising⁵¹⁵—offers a striking divergence in attitudes toward affirmative and negative speech rights.

Finally, outside of commercial speech, a frequent motif in denials of compelled speech claims is disparagement of the notion that such speech appears in any appreciable degree. Though of course the Court has not banished the right to refrain from speaking from First Amendment protection,⁵¹⁶ the threshold for recognition of its presence seems high. As noted above, the *Glickman* Court refused to concede that the required assessments for generic advertising implicated the plaintiffs' negative speech rights.⁵¹⁷ In one telling passage, the Court bluntly declared that "[o]ur compelled speech case law . . . is clearly inapplicable" to the check-off program, because the plaintiffs "are not required themselves to speak, but are merely required to make contributions for advertising."⁵¹⁸ Before validating Congress's must-carry rules in *Turner II*, the Court in *Turner I* minimized their impact on cable operators' expression. Far from "influenc[ing] an operator's agenda,"⁵¹⁹ the rules merely required operators to serve as a passive "conduit" for the programming of others.⁵²⁰ In the very different setting of *FAIR*, the Court similarly dismissed the contention that law schools' expression was affected by forced facilitation of military recruitment. On the contrary, the Solomon Amendment "regulates conduct, not speech"; it "affects what law schools must *do* . . . not what they may or may not *say*."⁵²¹ Accordingly, a law school's accommodation of recruiters' message "is not compelled speech because the accommodation does not sufficiently interfere with any

515. See *supra* notes 162-67 and accompanying text.

516. For an example of wholesale exclusion from First Amendment recognition, see *Miller v. California*, 413 U.S. 15, 23 (1973), stating that it "has been categorically settled . . . that obscene material is unprotected by the First Amendment."

517. See *supra* text accompanying notes 249-50.

518. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 470-71 (1997).

519. *Turner I*, 512 U.S. 622, 655 (1994) (quoting Daniel Brenner, *Cable Television and the Freedom of Expression*, 1988 DUKE L.J. 329, 379).

520. *Id.*

521. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 60 (2005).

message of the school.”⁵²² This perception of the statute’s negligible impact on speech thus promoted the Court’s disposition of the case as centrally about deference to military policy.⁵²³

C. *The Dominance of Countervailing Norms*

In a number of cases, the Court has allowed compromise of negative speech rights where government compulsion fosters values embodied by a constitutional guarantee. Under this calculus, the state’s interest in cultivating a constitutional norm outweighs the individual’s stake in avoiding certain expression. This pattern further suggests a tolerance for imposing speech at variance with more skeptical attitudes toward restraints on speakers.

An interest repeatedly enlisted to override negative speech claims is dissemination of diverse information and ideas. Promotion of diverse expression represents a core goal of the First Amendment,⁵²⁴ and one enclave the Court has recognized as a special incubator of unimpeded discussion is the university.⁵²⁵ Upholding the student activity fee in *Southworth*, the Court gave emphatic voice to this idea. The opinion stressed that the fee’s “sole purpose” was “facilitating the free and open exchange of ideas by, and among, [the university’s] students.”⁵²⁶ Thus, the fee’s admitted infringement on speech was justified by “the important and substantial purposes of the University,

522. *Id.* at 64.

523. *See id.* at 58 (“[J]udicial deference . . . is at its apogee’ when Congress legislates under its authority to raise and support armies.” (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981))); John F. O’Connor, *Statistics and the Military Deference Doctrine: A Response to Professor Lichtman*, 66 MD. L. REV. 668, 705 (2007) (“[The Court] invoked the military deference doctrine as its first step in constitutional analysis.”).

524. *See supra* note 325 and accompanying text; *see also* *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976); *Associated Press v. United States*, 326 U.S. 1, 20 (1945); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEMS OF FREE SPEECH* 241-52 (1993).

525. *See* *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (“The essentiality of freedom in the community of American universities is almost self-evident.”).

526. *Bd. of Regents v. Southworth*, 529 U.S. 217, 229 (2000).

which seeks to facilitate a wide range of speech.”⁵²⁷ Additionally, the Court’s *CLS* opinion sustaining application of Hastings’ all-comers policy carries overtones of this conception of the university’s mission. The Court launched its inquiry by observing that the association’s claims “must be analyzed in light of the special characteristics of the school environment.”⁵²⁸ In this context, the law school was entitled to act on the premise that the “educational experience is best promoted” by equal access to organization receiving RSO status.⁵²⁹

In some instances, government alignment with First Amendment aims has justified compelled access to media. Indeed, this theme pervades the Court’s opinion in *Red Lion*. Rebuffing broadcasters’ challenge to the fairness doctrine,⁵³⁰ the Court declared that it “enhance[s] rather than abridge[s] the freedoms of speech and press protected by the First Amendment.”⁵³¹ Requiring broadcasters to present “representative community views” on issues of public concern was “consistent with the ends and purposes” of the provisions protecting these freedoms.⁵³² Mandating opportunity to respond for persons attacked and candidates opposed on the air was likewise consistent with “the First Amendment goal of producing an informed public capable of conducting its own affairs.”⁵³³ More broadly, preventing monopolization of a communications medium served “the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.”⁵³⁴ For this marketplace to flourish, the public’s right to “receive suitable access to social, political, esthetic, moral, and other ideas and experiences”⁵³⁵ must be

527. *Id.* at 231.

528. *Christian Legal Soc’y v. Martinez (CLS)*, 130 S. Ct. 2971, 2988 (2010) (quoting *Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981)).

529. *Id.* at 2989 (quoting Brief for Respondents at 32, *CLS*, 130 S. Ct. 2971 (No. 08-1371), 2010 WL 1513023 at *32).

530. *See supra* notes 81-87 and accompanying text.

531. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375 (1969).

532. *Id.* at 394.

533. *Id.* at 392.

534. *Id.* at 390.

535. *Id.*

preserved. The fairness doctrine, then, stimulated the free flow of expression envisioned by the First Amendment.

The Court's validation of Congress's must-carry rules in *Turner*, as well, was marked by recognition of their congruence with First Amendment purposes. In *Turner I*, the Court stood the plaintiffs' First Amendment challenge on its head: "The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict . . . the free flow of information and ideas."⁵³⁶ Congress could therefore encourage that flow by preventing cable operators from "silenc[ing] the voice of competing speakers with a mere flick of the switch."⁵³⁷ Thus, a central goal of the legislation—as with the Free Speech Clause—was "promoting the widespread dissemination of information from a multiplicity of sources."⁵³⁸

That goal was also advanced by California's required access to shopping centers in *PruneYard*. On the surface, the California Supreme Court's opinion construing state law⁵³⁹ and the Court's decision upholding it were couched in narrow doctrinal terms.⁵⁴⁰ The State's insistence on access for expressive activity, however, tacitly acknowledged that shopping centers had largely supplanted city streets as "the foremost places for the dissemination of ideas and views, often on controversial issues of political or social significance."⁵⁴¹ Increasing the public's exposure to varied opinion therefore furthered both instrumental and democratic rationales for freedom of speech. Some state

536. *Turner I*, 512 U.S. 622, 657 (1993).

537. *Id.* at 656.

538. *Id.* at 662.

539. *Robins v. PruneYard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980).

540. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (noting distinctions from *Wooley*); *Robins*, 592 P.2d at 346-48.

541. Stanley H. Friedelbaum, *Private Property, Public Property: Shopping Centers and Expressive Freedom in the States*, 62 ALB. L. REV. 1229, 1229 (1999) (offering characterization as general observation, not endorsement of specific result in *PruneYard*).

supreme courts have explicitly recognized the free speech values served by the right of access found in state law.⁵⁴²

Nor is free expression the only constitutional norm on which the state may draw to overcome negative speech rights. Equal protection values may help to explain resolution of clashes between antidiscrimination laws and expressive association. In *Roberts*, the Court cited Minnesota's "compelling interest" in eradicating "invidious" gender discrimination to sustain application of state law to end the Jaycees' exclusion of women.⁵⁴³ The nature of that interest shares the purposes of the Equal Protection Clause.⁵⁴⁴ In reviewing the government's own gender-based classifications, the Court has required demonstration of an "exceedingly persuasive justification" for such action.⁵⁴⁵ This demanding standard stems from "our Nation[s] . . . long and unfortunate history of sex discrimination."⁵⁴⁶ Thus, Minnesota's effort to curtail private gender discrimination paralleled the Constitution's constraints on public forms of that conduct. By contrast, comparably forceful descriptions of the state's interest are conspicuously absent from the Court's opinion in *Dale*.⁵⁴⁷ Like Minnesota, New Jersey

542. See, e.g., *Bock v. Westminster Mall Co.*, 819 P.2d 55, 59-60 (Colo. 1991); *Batchelder v. Allied Stores Int'l, Inc.*, 445 N.E.2d 590, 593-94 (Mass. 1983); *N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757, 760-61 (N.J. 1994); *Commonwealth v. Tate*, 432 A.2d 1382, 1387-88 (Pa. 1981); *Alderwood Assocs. v. Wash. Env'tl. Council*, 635 P.2d 108, 114-17 (Wash. 1981).

543. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623, 628 (1984).

544. U.S. CONST. amend. XIV ("No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

545. *United States v. Virginia*, 518 U.S. 515, 531 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). In *United States v. Virginia*, the Court struck down a male-only admissions policy at the Virginia Military Institute after finding that Virginia had failed to show an "exceedingly persuasive justification" for the policy. *Id.* at 534. See also *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994) (barring the use of gender-based preemptory challenges); *Miss. Univ. for Women*, 458 U.S. at 724, 731 (invalidating admissions policy prohibiting males from enrolling in state-supported nursing school). The Court has reserved the question of whether classifications based on gender are "inherently suspect." See *J.E.B.*, 511 U.S. at 137 n.6.

546. *Virginia*, 518 U.S. at 531 (Brennan, J., plurality opinion) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)).

547. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

sought to bar discrimination, but based on homosexuality rather than gender.⁵⁴⁸ It may be that here, too, the Court's reasoning reflected a congruence between equal protection jurisprudence and state power. Though the Court has twice struck down laws aimed at homosexuality,⁵⁴⁹ it has pointedly declined to characterize homosexuality as a suspect or quasi-suspect classification.⁵⁵⁰ Therefore, while New Jersey had a valid interest in curbing discrimination based on sexual orientation, the Court may have regarded that interest as less weighty than the state interest in *Roberts*, and calibrated its analysis accordingly. Indeed, it seems unlikely that the Court would adopt such a deferential stance toward a group's representations where a state sought to ban racial discrimination—conduct that, when engaged in by government, triggers the strictest scrutiny under equal protection.⁵⁵¹

CONCLUSION

The concept of negative speech rights has more descriptive than normative value. Like restraints on speech, government directives plausibly labeled “compelled speech” can assume multifarious forms triggering an array of considerations. The pretense that these requirements are all governed by a single principle emanating from *Barnette* has aggravated the area's chronic uncertainty. In particular, doctrinal incoherence has obscured and fostered the vulnerability of negative speech rights.

The disjunction between the formal potency of rights not to speak and their practical weakness is not merely an academic matter. Government actions routinely test public

548. *See id.*

549. *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)) (striking down a statute criminalizing certain sexual conduct between members of the same sex); *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating a state constitutional amendment forbidding state entities from adopting a prohibition of discrimination based on homosexual, lesbian, or bisexual orientation).

550. *See Romer*, 517 U.S. at 628-32; Arthur S. Leonard, *Exorcizing the Ghosts of Bowers v. Hardwick: Uprooting Invalid Precedents*, 84 CHI.-KENT L. REV. 519, 521 (2009).

551. *See Miller v. Johnson*, 515 U.S. 900, 920 (1995); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

power to force citizens to express, support, or facilitate the messages of others. The school setting alone has generated a number of these issues: e.g., whether a student in an acting class must recite profanity that offends her beliefs,⁵⁵² whether a teacher must engage in expression prescribed by the curriculum that clashes with her views,⁵⁵³ whether a principal may condition a student's receipt of her diploma upon a prescribed apology for a comment made in her graduation speech,⁵⁵⁴ and whether teachers can be required to recite the Pledge of Allegiance.⁵⁵⁵ In the realm of criminal law, probation conditions that compel defendants publicly to declare their guilt⁵⁵⁶ or to apologize⁵⁵⁷ also impinge on

552. See *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1290 (10th Cir. 2004) (upholding a school's authority to require recitation of offending language as long as the decision was "reasonably related to legitimate pedagogical concerns" (quoting *Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 926 (2002))); see also *Ward v. Wilbanks*, No. 09-CV-11237, 2010 WL 3026428 (E.D. Mich. July 26, 2010) (upholding a university's authority to require a graduate student opposed to homosexuality to counsel a homosexual patient).

553. See, e.g., *Pelozo v. Capistrano Unified Sch. Dist.*, 782 F. Supp. 1412 (C.D. Cal. 1992); see also *Hensley v. Johnston Cnty. Bd. of Educ.*, No. 5:07-CV-231 F., 2010 WL 5437240 (E.D.N.C. Dec. 23, 2010) (upholding the dismissal of a teacher for her refusal to sign an apology for arguing with a student).

554. See *Corder v. Lewis Palmer School District*, 566 F.3d 1219, 1222-23, 1230-32 (10th Cir.), *cert. denied*, 130 S. Ct. 742 (2009), upholding a principal's action against compelled speech claim where the co-valedictorian had encouraged the audience "to find out more about the sacrifice He [Jesus Christ] made for you so that you now have the opportunity to live in eternity with Him" and where principal required student to include statement that "I realize that, had I asked ahead of time, I would not have been allowed to say what I did." See also *Wildman ex rel. Wildman v. Marshalltown School District*, 249 F.3d 768 (8th Cir. 2001), upholding that as a condition for a student's return from suspension, she apologize for her letter criticizing the basketball coach.

555. See, e.g., *Palmer v. Bd. of Educ.*, 603 F.2d 1271 (7th Cir. 1979); *Dunfey v. Seabrook Sch. Dist.*, No. 07-CV-140-PB, 2008 WL 1848655 (D.N.H. Apr. 24, 2008); Transcript of Ruling, *Lane v. Owens*, No. 03-B-1544 (D. Colo. Aug. 15, 2003), available at <http://aclu-co.org/case/lane-v-owens> (enjoining a school district from enforcing a statute compelling students and teachers to recite the Pledge of Allegiance).

556. See, e.g., *United States v. Gementera*, 379 F.3d 596, 598, 607 (9th Cir. 2004) (upholding condition of sentence that defendant stand outside post office wearing signboard stating "I stole mail; this is my punishment."); *Goldschmitt v. State*, 490 So. 2d 123, 124, 126 (Fla. Dist. Ct. App. 1986) (per curiam) (upholding as a condition of supervised release that a defendant place a bumper sticker on his vehicle stating "CONVICTED D.U.I.—RESTRICTED LICENSE"); *Brian Rogers, Couple in Theft from DA's Victims Fund Get Probation*, HOUS.

negative speech rights.⁵⁵⁸ Moreover, as the Court anticipated,⁵⁵⁹ the *Keller* standard has continued to invite challenges to state bar expenditures funded by mandatory dues.⁵⁶⁰ Even more likely to persist are efforts to overturn various kinds of compelled commercial speech. A future Supreme Court docket may well include a challenge to requirements that cigarette packages and advertisements carry conspicuous graphic images on their warning labels.⁵⁶¹

CHRON., July 8, 2010, <http://www.chron.com/disp/story.mpl/metropolitan/7100208.html> (convict was required to hold a sign declaring his theft for five hours every weekend for six years).

557. See, e.g., *People v. Johnson*, 528 N.E.2d 1360, 1361-62 (Ill. App. Ct. 1988) (setting aside as a condition for probation that a defendant place an advertisement in a newspaper that apologized for her conduct leading to her conviction for D.U.I. and was accompanied by picture taken of her when booked); *Todd v. State*, 911 S.W.2d 807, 817-18 (Tex. Crim. App. 1995) (upholding as a condition of probation that a defendant found guilty of criminally negligent homicide write letters of apology to the victim's girlfriend and family); Keyonna Summers, *Teens Must Post Apology on YouTube*, USA TODAY, June 9, 2008, at 3A (discussing a Florida judge's decision ordering teens to post an apology video on YouTube).

558. See Phaedra Athena O'Hara Kelly, Comment, *The Ideology of Shame: An Analysis of First Amendment and Eighth Amendment Challenges to Scarlet-Letter Probation Conditions*, 77 N.C. L. REV. 783, 786-87 (1999) (suggesting that "scarlet-letter" conditions may constitute impermissible compelled speech); see also Jaimy M. Levine, Comment, *"Join the Sierra Club!": Imposition of Ideology as a Condition of Probation*, 142 U. PA. L. REV. 1841, 1874, 1884-86 (1994) (arguing that a requirement that a defendant convicted of environmental crime join an environmental advocacy organization violates the right against compelled speech where less restrictive alternative exists).

559. See *supra* note 200 and accompanying text.

560. See, e.g., *Kingstad v. State Bar of Wis.*, 622 F.3d 708, 714-21 (7th Cir. 2010) (upholding the use of dues to a fund campaign to improve the public image of a state's lawyers).

561. See Required Warnings for Cigarette Packages and Advertisements, 75 Fed. Reg. 69,524 (proposed Nov. 12, 2010) (to be codified at 21 C.F.R. pt. 1141) (implementing a requirement of graphic warnings under the Family Smoking Prevention Act, Pub. L. No. 111-31, 123 Stat. 1776); see also *Cigarette Health Warnings*, U.S. FOOD AND DRUG ADMINISTRATION, <http://www.fda.gov/TobaccoProducts/Labeling/CigaretteWarningLabels/default.htm> (last visited July 11, 2011) (describing the requirements of proposed FDA rules for more graphic health warnings and providing examples of the proposed warnings). On June 21, 2011, the U.S. Department of Health and Human Services announced that graphic visual warnings will appear on all packages of cigarettes beginning

Addressing such issues sensibly does not call for a new meta-theory of negative speech rights. Rather, the fallacy of a comprehensive principle hinders a clear-eyed view of the particular First Amendment values at stake in discrete forms of compelled speech. As the Legal Realist movement demonstrated,⁵⁶² perceiving flaws in a sweeping legal vision can clear the way for a better understanding of law. Appropriate protection of negative speech rights may lie largely in recognition of their plurality.

in 2012. Duff Wilson, *U.S. Releases Graphic Images to Deter Smokers*, N.Y. TIMES, June 22, 2011, at B1.

562. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960*, at 193-208 (1992).